EDITOR'S NOTE

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. 84-1361-CFY
atus: GRANTED

Title: United States, Petitioner
v.
Kenneth Moses Loud Hawk, et al.

cketed:
bruary 26, 1985

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Stern, Kenneth S., Steenson, Tom, Schiffman, Ronald P.

try	Date	Note	Proceedings and Orders
1	Feb 26 1985	G	Petition for writ of certiorari filed.
2	Feb 26 1985		Appendix of petitioner United States filed.
3	Mar 25 1985		Brief of respondent Kenneth M. L. Hawk, et al. in opposition filed.
4	Mar 25 1985	G	Motion of respondents for leave to proceed in forma pauperis filed.
5	Mar 27 1985		DISTRIBUTED. April 12, 1985
6	Apr 4 1985	X	Reply brief of petitioner United States filed.
7	Apr 15 1985		Motion of respondents for leave to proceed in forma pauperis GRANTED.
8	Apr 15 1985		Petition GRANTED.
			**********
9	Apr 22 1985	N	Motion of respondent Dennis James Banks for appointment of counsel filed.
10	Apr 25 1985	N	Motion of respondent KaMook Banks for appointment of counsel filed.
11	Apr 29 1985	N	Motion of respondent Russ James Redner for appointment of counsel filed.
12	Apr 30 1985	N	Motion of respondent Kenneth Moses Loud Hawk for appointment of counsel filed.
13	May 3 1985		DISTRIBUTED. May 9, 1985. (Above 4 motions).
14	May 10 1985		REDISTRIBUTED. May 16, 1985. (Above 4 motions).
15	Apr 30 1985	G	Motion of respondents for appointment of counsel filed.
17	May 28 1985		Motion for appointment of counsel GRANTED and it is ordered that Kenneth Saul Stern, Esquire, of Milwaukie, Oregon, is appointed to serve as counsel for the respondents in this case.
18	May 31 1985		Joint appendix filed.
20	May 30 1985		Order extending time to file brief of petitioner on the merits until June 10, 1985.
21	Jun 10 1985		Record filed.
22	Jun 10 1985		Certified C.A. proceedings, original record & Reporter's transcript vols. 1 thur 41. Vol. 42 - 1 Sealed envelope. (2 boxes). Gullickson has Vol. 42.
23	Jun 10 1985		
24	Jun 11 1985		Brief of petitioner United States filed.
26	Jun 24 1985		Order extending time to file brief of respondent on the merits until August 3, 1985.
27	Jul 31 1985		Brief of respondents Kenneth Moses Loud Hawk, et al. filed.
29	Aug 1 1985		Order extending time to file brief of respondent on the merits until August 12, 1985.
30	Aug 3 1985		Brief amicus curiae of Public Defender Service for DC filed.

. 84-1361-CFY

try	Date	Note	Proceedings and Orders
1	Jul 31 1985		Application for leave to file respondents' brief on the merits (A-96) in excess of the page limitation filed,
2	Jul 31 1985		and order denying same by Rehnquist, J., on August 1, 1985.
3	Sep 11 1985		SET FOR ARGUMENT. Tuesday, November 12, 1985. (1st case).
4	Sep 12 1985		CIRCULATED.
5	Oct 31 1985	X	Reply brief of petitioner United States filed.
6	Nov 12 1985		ARGUED.

84-1361

No.

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether time consumed by appellate review should be excluded from the length of delay relevant under the Speedy Trial Clause of the Sixth Amendment, where the government successfully appealed pursuant to 18 U.S.C. 3731 from orders dismissing the indictment and suppressing evidence, and respondents were free of all restrictions on their liberty during the appeals.

2. Whether delay attributable to respondents' interlocutory appeal should be considered in evaluating respondents' speedy trial claim.

3. Whether, even if time on appeal should be included under the Speedy Trial Clause, respondents' right to a speedy trial has been violated under the test of *Barker* v. *Wingo*, 407 U.S. 514 (1972).

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, defendants Russ James Redner, Dennis James Banks, and Darlene Pearl Nichols, also known as KaMook Banks, were appellees below and are respondents herein.

Charges against defendant Leonard Peltier were severed from this action and later dismissed. Defendant Anna Mae Aquash is deceased.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the dismissal of the indictment on the ground that respondents' right to a speedy trial was violated (App. 1a-25a) is reported at 741 F.2d 1184. The opinion of the court of appeals addressing respondents' vindictive prosecution claims (App. 26a-35a) is reported at 682 F.2d 841. The opinion of the en banc court of appeals reversing the district court's suppression order and dismissal of the indictment with prejudice (App. 36a-87a) is reported at 628 F.2d 1139. The panel opinion in that appeal (App. 88a-118a) is unreported. The district court's opinion dismissing the

indictment on speedy trial grounds (App. 119a-138a) is reported at 564 F. Supp. 691. The district court's orders on the vindictive prosecution motion (App. 139a-143a, 144a-148a), its bench ruling dismissing the indictment under Fed. R. Crim. P. 48(b) (App. 149a-151a), and its suppression order (App. 152a-157a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. 158a-159a) was entered on August 30, 1984. A petition for rehearing was denied on January 8, 1985 (App. 160a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

Respondents were apprehended on November 14, 1975 and charged on December 22, 1975, with unlawfully possessing and transporting dynamite and firearms. Because of protracted litigation over pretrial defense motions, respondents have yet to be tried. Twice, respondents convinced the district court to dismiss all or part of the indictment. Both times, the government prevailed in the court of appeals. Following the last remand, the district court once again dismissed the indictment, ruling that respondents' Sixth Amendment right to a speedy trial had been violated (App. 119a-138a). The court of appeals affirmed (*id.* at 1a-25a). A summary chronology of the complex

proceedings in this case is included at page 161a of the Appendix.

1. a. On November 13, 1975, the Federal Bureau of Investigation notified Oregon law enforcement authorities that federal fugitives might be traveling through the state in a motor home and station wagon. The FBI's teletype message described both vehicles and provided the license number of the motor home. The next day, Oregon state trooper Griffiths observed two vehicles fitting the FBI's description. After verifying the license number of the motor home, he stopped the vehicle and told its occupants to step outside. Former defendants Peltier and Aquash stepped out of the motor home, followed by respondent KaMook Banks and her infant child. Griffiths was told that no one else was inside. Just then the motor home accelerated quickly and Peltier fled, jumping over a nearby fence and exchanging gunfire with Griffiths. Griffiths then followed the motor home and found it one-half mile from the initial stop, with no one inside.[1] Meanwhile, another state trooper approached the station wagon, which had stopped behind the motor home, and ordered its occupants out of the car. Respondents Redner and Loud Hawk emerged. Both vehicles were locked and impounded while search warrants were obtained. App. 37a-40a.

Searches of the two vehicles pursuant to state and federal search warrants[2] disclosed 350 pounds of dynamite, 6 partially assembled time bombs, and a

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[1] The government would introduce evidence at trial showing that respondent Dennis Banks was the driver of the motor home. Banks was not arrested until January 26, 1976.

[2] State warrants were obtained and executed on November 15, 1975. Federal warrants were obtained and executed the following day. App. 40a & n.3.

loaded .44 caliber revolver in the station wagon, and 2600 rounds of ammunition, 150 blasting caps, 9 empty hand grenades, and 13 firearms, 8 of which had obliterated serial numbers, in the motor home. On November 16, 1975, Oregon state law enforcement officers removed the dynamite and destroyed it without consulting federal officials. App. 40a-42a & n.4, 45a-46a.

b. On December 22, 1975, a five-count superseding indictment was returned against respondents in the United States District Court for the District of Oregon. Clerk's Record (C.R.) 11-1. The first three counts charged respondents with unlawful possession and transportation of an unregistered and unnumbered destructive device, including seven cases of dynamite, along with timing devices and detonating materials, in violation of 26 U.S.C. 5861(d), (i) and (j), 5871. Count four charged respondents with unlawfully transporting firearms whose serial numbers had been obliterated, in violation of 18 U.S.C. 922(k).[3] Count five charged respondent Dennis Banks with possession of firearms by a convicted felon, in violation of 18 U.S.C. App. 1202(a).

2. a. On December 24, 1975, respondents filed a motion to dismiss the destructive device charges or, alternatively, to suppress any secondary evidence relating to the dynamite, because of its destruction by the state police (C.R. 17). On January 21, 1976, the trial was postponed until March 8, 1976, on the motion of respondents (C.R. 36, 37, 39). The court denied respondents' suppression motion on January 23, 1976 (C.R. 38), but thereafter granted their request

[3] Counts 1 through 4 also charged Peltier and Aquash. Peltier's case was severed and the charges against him later dismissed. Aquash is now deceased.

for reconsideration (C.R. 43) and ordered a pretrial evidentiary hearing. On respondents' motion and over the objection of the government, trial was again continued until May 12, 1976 (C.R. 62, 64).

Hearings on respondents' motion to dismiss or to suppress evidence of the dynamite were held on March 19 and 22, 1976 (C.R. 81, 85). The district court granted the motion on March 31, 1976, suppressing "all evidence, tangible and intangible, relating to" the dynamite (App. 157a). The government filed a notice of appeal from the suppression order on April 19, 1976 (C.R. 115), and sought a continuance of the May 12 trial date pending resolution of the appeal (C.R. 120, 121). The government repeatedly urged that its right to appeal would be vitiated if it were forced to go to trial before the appeal was decided and without the suppressed evidence (*e.g.*, C.R. 133, 136, 139; 4/26/76 Tr. 5-7). The continuance was denied by the district court, and a stay of trial was denied by the court of appeals.

When the case was called for trial on May 12, 1976, the government, consistent with its earlier representations, refused to proceed because of the pending appeal (App. 150a; C.R. 142). The district court thereupon dismissed the entire indictment with prejudice, invoking Fed. R. Crim. P. 48(b).[4] App. 151a; C.R. 142. The government immediately appealed from the dismissal (C.R. 149; 5/12/76 Tr. 12). The two appeals were consolidated and expedited

[4] Fed. R. Crim. P. 48(b) provides:

> If there is unnecessary delay * * * in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

(see App. 123a). Respondents were unconditionally released during the appeal (C.R. 142; see App. 151a).

b. The government filed its opening brief on June 28, 1976, and its reply brief on August 2, 1976. The appeal was argued and submitted on October 15, 1976 (App. 123a). A divided panel of the court of appeals affirmed on July 26, 1977 (*id.* at 88a-118a). The government's petition for rehearing with suggestion of rehearing en banc was filed on September 7, 1977, and granted on October 17, 1977 (*id.* at 123a). No further briefs were received by the court, nor was the case reargued. On March 6, 1978, the court of appeals remanded to the district court for an evidentiary hearing on whether federal officials participated in the destruction of the dynamite and whether respondents suffered any prejudice from its destruction (C.R. R-1;[5] App. 44a-45a, 123a). The court of appeals retained jurisdiction over the case and requested findings from the district court within 45 days (C.R. R-1, at 2; App. 45a). The district court held the hearing on May 9 and 10, 1978, and issued its findings on August 23, 1978 (*id.* at 123a).

On August 7, 1979, the court of appeals, sitting en banc, reversed the suppression order and ordered the dynamite counts reinstated (App. 36a-87a). The court also determined that while the government could have gone to trial on the firearms counts pending the appeal, the district court erred in dismissing those counts with prejudice (*id.* at 60a-62a). Accordingly, the court ordered that the district court reconsider its dismissal of those counts (*id.* at 62a).

[5] The designation "C.R. R-" refers to the numbering system used in the Clerk's Record after March 1, 1978.

Respondents' petitions for rehearing and certiorari were denied on October 1, 1979 and March 3, 1980 (445 U.S. 917), respectively. The mandate of the court of appeals issued on March 12, 1980, 46 months after the government took its appeal from the dismissal of the indictment (App. 4a).

3. a. On remand, the government contended that the firearms counts should be reinstated rather than presented again to a grand jury (4/14/80 Tr. 5). Respondents argued that those counts could not be reinstated (5/12/80 Tr. 6-7). On May 12, 1980, the court ordered the government to reindict on the firearms charges (5/12/80 Tr. 7). Following respondents' requests for continuances (C.R. R-41, R-45, R-50, R-51; 4/14/80 Tr. 9-10; 5/12/80 Tr. 14-15), the court set trial for September 3, 1980 (5/12/80 Tr. 20). Respondents stipulated that the pendency of numerous pretrial motions created excludable delay under the Speedy Trial Act (18 U.S.C. 3161 *et seq.*) running from March 17, 1980, the date the mandate was received, until all of the motions were decided (5/12/80 Tr. 18-19).[6] By April 24, 1980, at least 19 pretrial defense motions were outstanding (4/14/80 Tr. 9; C.R. R-33, R-37, R-39), and on that date respondents filed a motion requesting another two weeks for the filing of additional pretrial motions (C.R. R-41).

The grand jury returned a superseding indictment on June 18, 1980 (C.R. R-81). The new indictment

[6] At the time, the parties were under the misimpression that the mandatory dismissal sanction of the Speedy Trial Act applied to this case. See generally 18 U.S.C. 3163(c); *United States* v. *Watson*, 623 F.2d 1198, 1202 & n.8 (7th Cir. 1980).

charged respondents with two of three original destructive device counts and added two new destructive device counts. It charged respondents with the original firearms count (although it substituted "receiving" for "transporting") and again charged Dennis Banks with being a felon in possession of firearms. The indictment also charged KaMook Banks with a new count of receiving firearms while under indictment, in violation of 18 U.S.C. 922(h)(1).

Respondents filed a number of new motions in response to the superseding indictment (C.R. R-88, R-90, R-92, R-93, R-95-99, R-102, R-103, R-105), including a motion to dismiss on the ground of vindictive prosecution (C.R. R-97). On August 8, 1980, the district court granted the vindictive prosecution motion as to KaMook Banks and denied it as to the other respondents (App. 139a-143a, 144a-148a). Those respondents filed notices of appeal between August 15 and 22, 1980, and the government noticed an appeal from the dismissal of charges against KaMook Banks on September 2, 1980 (C.R. R-125, R-130, R-133, R-139). The appeals were consolidated and expedited (C.R. R-144-146, R-149). Respondents remained free during the appeal on their own recognizance.

b. Respondents filed their opening brief on October 15, 1980, and the government filed its brief on November 3, 1980. The appeal was argued and submitted on January 7, 1981. On July 29, 1982, the court of appeals reversed the dismissal of the indictment with respect to KaMook Banks[7] and dismissed

[7] The government did not contest the dismissal of the newly added count of receiving firearms while under indictment.

the interlocutory appeals of the other respondents for want of jurisdiction (App. 26a-35a; C.R. R-190).[8] Respondents' petitions for rehearing and certiorari were denied on October 5, 1982 and January 10, 1983 (459 U.S. 1117), respectively. The court of appeals' mandate issued on January 31, 1983, 29 months after the appeals were filed (App. 5a).

4. a. With trial set for June 13, 1983 (after one continuance obtained by the government and two ordered by the court on its own motion),[9] the district court, on May 20, 1983, dismissed the indictment a third time, ruling that respondents' Sixth Amendment right to a speedy trial had been violated (App. 119a-138a). The court also decided that the delay violated the Due Process Clause (App. 129a-130a n.7). The government filed a notice of appeal on June 17, 1983, and unsuccessfully urged the district court to request that the court of appeals expedite the appeal (C.R. R-268, at 2 n.3; 6/30/83 Tr. 14). As before, respondents were free of all restrictions during the appeal. Respondents have not been in custody since early 1976 (App. 9a, 136a; C.R. 43, 45, 50, 51).

b. The government's opening brief was filed on August 16, 1983, and its reply brief on September 27, 1983. The appeal was argued on January 4, 1984. A divided panel of the court of appeals affirmed on August 30, 1984 (App. 1a-25a).

[8] On June 28, 1982, this Court held that the courts of appeals are without jurisdiction to review interlocutory orders denying motions to dismiss on the ground of vindictive prosecution. *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263.

[9] App. 125a; C.R. R-196-198, R-223, R-225.

The court applied the four-part balancing test set forth in *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972), assessing the length of the delay, the reasons for the delay, respondents' assertion of their right to a speedy trial, and the degree of prejudice to respondents. The majority counted the entire 90 months from the November 1975 arrests until the May 1983 dismissal as the relevant period of delay, including the entire length of time expended on the two earlier appeals, which consumed 75 of those 90 months (App. 11a). In counting the time on the government's appeals, during which charges had been dismissed, the court distinguished *United States* v. *MacDonald*, 456 U.S. 1 (1982), which held that the Speedy Trial Clause does not apply to periods when charges have been dismissed, on the ground that the dismissal in *MacDonald* was voluntary, while here the dismissals were over the government's objections (App. 8a). The court did not find it significant that respondents "were not incarcerated or subjected to other restrictions on their liberty during the time when the indictments had been dismissed" (*id.* at 9a).

Assessing the reasons for the delay, the majority counted against the government the court's own lengthy delay in deciding the first appeal (App. 12a-13a). The court found postponement of trial on the firearms counts "wholly unnecessary" and therefore weighed the appeal time heavily against the government with respect to those counts (*id.* at 12a). With respect to the dynamite counts, the court found that the government's appeal of the suppression order was clearly justified and that the delay was largely attributable to the court's own processes, a "neutral" reason that it weighed against the government, although not heavily (*id.* at 13a). The court purported to weigh the time spent on the second appeal against neither the government nor the defendants, although it did not excuse the delay, except for the six months spent on respondents' frivolous certiorari petition (*id.* at 14a-15a). The court considered the 23 months that the appeal was before it a reasonable time, involving "no * * * undue delay" (*id.* at 15a).

The majority also found that respondents had adequately asserted their right to a speedy trial (App. 15a). Finally, although the majority acknowledged that respondents had not suffered prolonged incarceration, it did find prejudice resulting from the pendency of unresolved charges and a slight amount of prejudice resulting from the deaths and fading memories of some witnesses (*id.* at 16a-17a). Balancing all of these factors, and concluding that "[t]he most weighty factor by far is the length of delay" (*id.* at 17a), the majority held that respondents' Sixth Amendment right had been violated (App. 18a). The court did not address respondents' due process claim.

In dissent, Judge Wallace concluded that *United States* v. *MacDonald*, *supra*, required exclusion from the length of delay of the time when no live indictment was outstanding (App. 19a-23a). Nor did he count the period during the interlocutory appeals by the respondents other than KaMook Banks (*id.* at 24a). The remaining time, between six months and one year for the various respondents, did not, in Judge Wallace's view, violate the Speedy Trial Clause (*id.* at 24a-25a).

REASONS FOR GRANTING THE PETITION

In this case, respondents were apprehended in November 1975 transporting a substantial arsenal of firearms, ammunition, and explosives, much of which it was illegal for them to receive, possess, or transport. After their repeated and partially successful efforts to avert or delay trial on the rather straightforward criminal charges growing out of this incident and to prevent the government from utilizing all of its available evidence in prosecuting those charges, respondents have—in what we regard as the ultimate irony—been rewarded with a ruling by the court of appeals that their constitutional right to a speedy trial was violated by the appellate litigation growing out of their various legally erroneous claims.

The decision below represents a significant departure from the standards established by this Court and followed by other courts of appeals in evaluating claims under the Speedy Trial Clause. More than six of the seven and one-half years of pretrial delay in this case are attributable to appeals taken by the government from orders dismissing the indictment and suppressing evidence, an interlocutory appeal taken by three of the respondents from the denial of their motion to dismiss, and respondents' petitions for rehearing and certiorari. Having repeatedly induced the district court to err, respondents cannot complain of the time necessary for the government to seek and obtain correction of those errors on appeal. And having determined to take an interlocutory appeal of an issue that is fully preserved for review following a final judgment of conviction, respondents similarly cannot complain of the time spent by the court of appeals in deciding their appeal.

The proper treatment under the Speedy Trial Clause of periods when a case is on appeal is a frequently recurring issue of considerable practical importance that has divided the courts of appeals. It is an issue lurking in every case where the government has taken an appeal pursuant to 18 U.S.C. 3731. The decision below departs from this Court's precedents, erroneously restricts the government's right to appeal, and adversely affects the public's interest in lawfully prosecuting criminal offenders. Further review is therefore warranted.[10]

1. In *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court established a balancing test to evaluate claims under the Speedy Trial Clause. The Court identified (407 U.S. at 530; footnote omitted) four relevant factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." When the government appeals in good faith from an order suppressing evidence or dismissing an indictment, the time spent on appeal should not be included in the computation of the length of delay.[11]

a. Where an indictment has been dismissed and the defendant is not subject to actual restraints on

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[10] The Speedy Trial Act's more stringent provisions have effectively mooted much litigation about the requirements of the Speedy Trial Clause of the Sixth Amendment as applied to federal prosecutions. That is not true, however, with respect to the present issue. Because time devoted to pretrial appeals is automatically excluded under the Act (see 18 U.S.C. 3161(d)(2) and (h)(1)(E)), the constitutional speedy trial guarantee governs this important issue.

[11] Alternatively, if appeal time is included within the length of the delay, it should be charged against the defendants when the government is successful on appeal or else wholly excused under the "reason for the delay" factor identified in *Barker* v. *Wingo*, *supra*.

his liberty, the Speedy Trial Clause does not apply. *United States* v. *MacDonald*, 456 U.S. 1 (1982). In *MacDonald*, the Court held that the Speedy Trial Clause did not apply to the period between the government's dismissal of charges and the defendant's indictment more than four years later. "Once charges are dismissed," the Court held, "the speedy trial guarantee is no longer applicable" (456 U.S. at 8; footnote omitted). This rule applies here to exclude the time on the government's appeals: no charges were outstanding against respondents during these periods, for the indictment had been dismissed by the district court, and respondents were unconditionally released during the appeals.[12] The government could not have tried respondents during these periods no matter how dearly it wanted to do so. Cf. *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967) (speedy trial guarantee applied where indictment was not discharged and case could be restored to docket on prosecutor's request); *Arnold* v. *McCarthy*, 566 F.2d 1377, 1383 (9th Cir. 1978) (following dismissal of indictment, defendant was not an "accused" who could demand a speedy trial). Hence, the Speedy Trial Clause does not apply. Respondents' claim should have been analyzed instead under the Due Process Clause. See *MacDonald*, 456 U.S. at 7; *United States* v. *Lovasco*, 431 U.S. 783 (1977); note 21, *infra*.

[12] The periods that should be excluded on this ground extend from May 12, 1976, when the indictment was dismissed as to all respondents, until the superseding indictment was returned on June 18, 1980, and, as to KaMook Banks, from August 8, 1980, when the superseding indictment against her was dismissed, until January 31, 1983, when the court of appeals' mandate issued.

The court below erred in distinguishing *MacDonald* on the ground that the government's dismissal of charges there was voluntary, while here the indictment was dismissed over the government's objection (App. 8a-9a). This Court's reasoning in *MacDonald* is fully applicable to the circumstances of this case (456 U.S. at 8-9):[13]

> The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.
>
> Once charges are dismissed, * * * the formerly accused is, at most, in the same position as any other subject of a criminal investigation.

[13] The Court nowhere suggested that its holding might be limited to voluntary dismissals. Indeed, the Court twice indicated its intent that the holding apply to all dismissals, including those entered over the government's objection. The Court stated (456 U.S. at 7 n.7) that its "holding agrees with the determination made by Congress in enacting the Speedy Trial Act of 1974 * * * that if charges are initially dismissed and later reinstated, the period between the dismissal and the reinstatement is not to be included in computing the time within which a trial must commence. 18 U.S.C. §§ 3161(d), 3161(h)(6)." Section 3161(d)(2) applies where an indictment dismissed by the district court is reinstated following appeal. In the same footnote, the Court noted that most of the courts of appeals had "also reached the conclusion that the period after dismissal of initial charges is not included" under the Speedy Trial Clause. One of the cases cited, *United States* v. *Bishton*, 463 F.2d 887 (D.C. Cir. 1972), held that the time attributable to the government's appeal from the dismissal of an indictment was not relevant for purposes of the Speedy Trial Clause.

> Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life. This is true whether or not charges have been filed and then dismissed. * * * But with no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. * * * Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.

There were no live indictments outstanding against respondents during the government's appeals, and respondents were not subject to any restraints on their liberty. The government's appeals exposed respondents to the same "public obloquy, stress and anxiety" that would have been caused by any public knowledge of the government's interest in or consideration of criminal charges against them. Even where it is clear that the government intends to reindict or otherwise to pursue the case, the Speedy Trial Clause does not apply. See *United States* v. *Samples*, 713 F.2d 298, 301-302 (7th Cir. 1983) (Speedy Trial Clause not applicable to period between dismissal of indictment for improper venue and reindictment). Simply put, if there are no pending charges that can be tried, the Sixth Amendment does not require the impossibility of trying them speedily.

b. Even if the indictment has not been dismissed or the defendant is subject to arrest or bail pending appeal, the time attributable to government appeals from pretrial orders cannot be subjected to the strictures of the Speedy Trial Clause without severely restricting the government's right to appeal under 18

U.S.C. 3731 [14] and creating substantial practical difficulties. As the Court has consistently stated, "[t]he right of a speedy trial is necessarily relative. * * * It does not preclude the rights of public justice.'" *United States* v. *Ewell*, 383 U.S. 116, 120 (1966), quoting *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905). The government has a vital interest in securing appellate review of district court orders dismissing indictments and suppressing evidence. Such review can take place, consistent with the Double Jeopardy Clause, only prior to trial. The "deliberate pace" (*Ewell*, 383 U.S. at 120) of the criminal process is, with good reason, especially unhurried at the appellate stage. See *United States* v. *Bishton*, 463 F.2d 887, 890 (D.C. Cir. 1972) ("the function of appellate courts necessarily casts the delay attendant upon their deliberations in a somewhat different light"); see also *Harrison* v. *United States*, 392 U.S. 219, 221-222 n.4 (1968) (delays on appeal resulted from "the

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[14] 18 U.S.C. 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence * * *, not made after the defendant has been put in jeopardy * * *, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases * * * shall be diligently prosecuted.

need to assure careful review of an unusually complex case").

It would therefore make little sense to require that the appellate process proceed with the speed required by the Sixth Amendment. Cf. *Doescher* v. *Estelle*, 454 F. Supp. 943, 949-950 (N.D. Tex. 1978) (no Sixth Amendment right to a speedy appeal); 18 U.S.C. 3161(h)(1)(E) (delays resulting from interlocutory appeals excludable under the Speedy Trial Act).[15] The rule adopted by the court below could force the government to seek writs of mandamus from this Court to compel the courts of appeals to issue decisions once cases have been pending on appeal for a significant period. This unhappy and impractical result is hardly required, as the court below apparently believed (App. 13a), by this Court's reference in *Barker* v. *Wingo* (407 U.S. at 531) to delay caused by "overcrowded courts." Taken in context, that statement applies more naturally to trial court congestion than it does to appellate delay, where more time is spent reviewing legal issues than in waiting for a hearing date on a crowded calendar. Moreover, the Ninth Circuit overlooked a critical distinction in equating its own delays with delays due to trial court congestion—the latter are caused by circumstances beyond a defendant's control, whereas the appeals here were necessitated entirely by re-

[15] " '[I]t will be an unusual case in which the time limits of the Speedy Trial Act has been met but the sixth amendment right to a speedy trial has been violated.' " *United States* v. *Saintil*, 705 F.2d 415, 418 (11th Cir. 1983), quoting *United States* v. *Nance*, 666 F.2d 353, 361 (9th Cir. 1982). The policy dictating exclusion of appeal time under the Act, while not dispositive (see 18 U.S.C. 3173), therefore strongly suggests that appellate delay does not violate the Speedy Trial Clause.

spondents' legally erroneous contentions. In sum, where the government has, in good faith, taken an appeal under 18 U.S.C. 3731, the resulting delay should be excluded under the Speedy Trial Clause.[16] See generally *United States ex rel. Mitchell* v. *Fairman*, 750 F.2d 806, 809 (7th Cir. 1984) (22 months on appeal of suppression order not weighed against the state because "the state had every right to appeal" and "the appeal was not taken just for purposes of delay").

[16] The court of appeals faulted the government for refusing to go to trial on the firearms counts during the pendency of the appeal of the district court's order suppressing evidence of the dynamite (App. 12a; see pages 5-7, *supra*). But the government acted in good faith, and surely had no reason to anticipate that the court of appeals would take over three years to decide the appeal. Moreover, the firearms counts had not been severed from the dynamite counts—the government would have had to go to trial on all counts, thereby losing its right to appeal the suppression order. Cf. *United States* v. *Carey*, 746 F.2d 228, 230-231 (4th Cir. 1984), cert. pending, No. 84-1272 (exclusion of time under the Speedy Trial Act where counts are joined for trial and no severance motion has been granted). Accordingly, the time on appeal cannot weigh against the government, especially where the government was successful in reversing the district court's dismissal with prejudice. See generally *United States* v. *Saintil*, 705 F.2d at 418 (where government made a good faith mistake in interpreting district court's order, the delay attributable to its appeal should not be weighed heavily); *Jones* v. *Commonwealth*, 495 Pa. 490, 434 A.2d 1197 (1981) (delay attributable to government's unsuccessful interlocutory appeal did not violate speedy trial guarantee). Even if the period on the first appeal should be included with respect to the firearms counts, there is absolutely no reason to include that period with respect to the dynamite counts, where the government's appeal was concededly necessary because crucial evidence had been suppressed (App. 12a-13a).

c. Including appeal time within the length of delay under the Speedy Trial Clause—whether it be weighed lightly or heavily against the government—is especially inappropriate where, as here, the government has been successful on appeal. Having induced the trial court to err, respondents are in a poor position indeed to claim that their constitutional rights have been violated by the time needed for the government to obtain correct legal rulings from the court of appeals. If this time is to be included at all, it must be weighed against respondents. See *United States* v. *Brown*, 520 F.2d 1106, 1130-1131 (D.C. Cir. 1975) (MacKinnon, J., dissenting from denial of rehearing en banc). As the court stated in *People* v. *Jamerson*, 198 Colo. 92, 97, 596 P.2d 764, 768 (1979):

> Defendant's original motion to dismiss was not legally sustainable * * *. He cannot now use the fact that a trial court erroneously upheld his position to predicate an argument that an unreasonable delay took place because the prosecution appealed and obtained a reversal of the erroneous ruling.

See also *State* v. *Sieckmann*, 3 Or. App. 454, 459-460, 474 P.2d 367, 370 (1970) ("[s]ince defendant's motion to dismiss the original indictment was without merit, * * * and the resulting erroneous order of dismissal was the cause of the state's appeal, the defendant must share responsibility for the delay"); *State* v. *White*, 118 Ariz. 47, 56, 574 P.2d 840, 849 (Ct. App. 1977) (defendant's motion "is made in the context of the possibility of an appeal by the State if it is granted").

Excluding time resulting from a statutorily authorized appeal of the district court's grant of a defense

motion comports with the rule that the period necessary for the district court to consider such motions does not give rise to a Sixth Amendment violation:

> Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon.

United States v. *Auerbach*, 420 F.2d 921, 924 (5th Cir.), reh'g denied, 423 F.2d 676 (1969), cert. denied, 399 U.S. 905 (1970); see also, *e.g.*, *United States* v. *Litton Systems, Inc.*, 722 F.2d 264, 270 (5th Cir. 1984), cert. denied, No. 83-1550 (May 14, 1984); *Scarbrough* v. *State*, 76 Wis. 2d 87, 99-103, 250 N.W. 2d 354, 360-361 (1977). Respondents caused most of the delay in this case by filing legally erroneous motions. Having set the judicial process in motion, they should not now reap the windfall of a dismissal under the Speedy Trial Clause predicated on the resultant delay.

d. The failure of the court below to exclude from the length of delay time attributable to the government's appeals conflicts with the decisions of other courts of appeals. In *United States* v. *Jackson*, 508 F.2d 1001, 1004 (7th Cir. 1975), for example, the court held that, "[i]n calculating the length of delay, * * * the period of delay attributable to review of an order appealable under 18 U.S.C. § 3731 should not be considered." Similarly, in *United States* v. *Bishton*, 463 F.2d 887, 890 (D.C. Cir. 1972), the court held that "the time spent on appeals is not generally included for purposes of calculating the period of delay." [17] In *United States* v. *Herman*, 576 F.2d 1139,

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[17] Although *Bishton* predates *Barker* v. *Wingo*, the court of appeals used a similar balancing test in assessing the

1146 (5th Cir. 1978), on which the court below erroneously relied (App. 11a), the court stated that it agreed with the principles expressed in *Jackson* and *Bishton*, and held that "[a]n interlocutory appeal by the government is generally a valid reason that justifies an appropriate delay." [18] Other courts have similarly held that time on government appeals may not be charged against the government in evaluating speedy trial claims. See *United States* v. *Litton Systems, Inc.*, 557 F. Supp. 568, 571 (S.D. Miss. 1983), rev'd on other grounds, 722 F.2d 264 (5th Cir. 1984), cert. denied, No. 83-1550 (May 14, 1984); *United States* v. *Sebastian*, 428 F. Supp. 967,

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defendant's speedy trial claim (see 463 F.2d at 889-890). In subsequent cases, the District of Columbia Circuit has been more reluctant to discount entirely the delay caused by appellate processes, citing this Court's language in *Barker* v. *Wingo* (407 U.S. at 531) that delay caused by overcrowded courts should be weighed lightly against the government. See *United States* v. *Sarvis*, 523 F.2d 1177, 1183 (D.C. Cir. 1975); *United States* v. *Brown*, 520 F.2d 1106, 1109 (D.C. Cir. 1975); *United States* v. *Perry*, 353 F. Supp. 1235 (D.D.C. 1973), aff'd mem. (D.C. Cir. Dec. 12, 1973). But see *United States* v. *Rosenbloom*, 511 F.2d 777 (D.C. Cir. 1974). In *Brown* and *Perry*, the only cases where the court found a Sixth Amendment violation, the defendants were incarcerated during parts of the delay and there was considerable delay in the trial court that was not justified. The court of appeals has never overruled *Bishton*.

[18] The court in *Herman* went on to analyze the propriety of the appeal more carefully because the defendant was incarcerated during the appeal (576 F.2d at 1146). After examining "the necessity of the appealed question to the government's case, the strength of the government's position on the issue, and the seriousness of the crime" (*ibid.*), the court held that the appeal was justified and the resulting delay could not be weighed against the government.

975 (W.D.N.Y.), aff'd, 562 F.2d 211 (2d Cir. 1977); *State* v. *Helenbolt*, 334 N.W.2d 400, 405 (Minn. 1983). But see *Atkins* v. *Michigan*, 644 F.2d 543, 548 (6th Cir.), cert. denied, 452 U.S. 964 (1981) (defendant incarcerated during appeal); *Chism* v. *Koehler*, 392 F. Supp. 659 (W.D. Mich. 1975), aff'd on opinion below, 527 F.2d 612 (6th Cir.), cert. denied, 425 U.S. 944 (1976) (same); *Day* v. *United States*, 390 A.2d 957 (D.C. 1978) (appeal not expedited). The conflict plainly warrants resolution by this Court.

2. The court of appeals clearly erred in failing to exclude from the length of delay the more than two years attributable to the interlocutory appeal taken by respondents (other than KaMook Banks) of the district court's denial of their motion to dismiss for vindictive prosecution. Although the court of appeals purported not to weigh this time against the government (App. 15a), it did count the time within the length of delay, to which the court gave virtually dispositive force (see *id.* at 17a). The time spent on the appeal before the court of appeals should have been entirely excused, as was the time attributable to respondents' frivolous certiorari petition following the dismissal of their appeal for want of jurisdiction under *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982).

In *United States* v. *Ewell*, *supra*, this Court held that defendants could be retried following a successful collateral attack on their convictions, notwithstanding a delay of 19 months between their original arrest and reindictment. The Court reasoned (383 U.S. at 121) that interpreting the Speedy Trial Clause to prohibit such delay would "seriously undercut" the policies underlying the settled interpreta-

tion of the Double Jeopardy Clause, which permits retrial following reversal of a conviction on appeal. Similarly, in *Harrison* v. *United States*, *supra*, the Court rejected (392 U.S. at 221-222 n.4) as "wholly without merit" the defendant's claim that he had been denied a speedy trial by lengthy delays on the successful appeals he had taken from his earlier convictions. The courts of appeals have also consistently held that time consumed on defendants' appeals does not count toward the length of delay for purposes of the Speedy Trial Clause. See *United States* v. *Bizzard*, 674 F.2d 1382, 1386 (11th Cir.), cert. denied, 459 U.S. 973 (1982); *United States* v. *Hill*, 622 F.2d 900, 909 (5th Cir. 1980); *Dandridge* v. *United States*, 265 F.2d 349, 350 (D.C. Cir. 1959); see also *In re Williams*, 393 N.E.2d 353 (Mass. 1979). The inclusion of defendants' appeal time, moreover, is inconsistent with the exclusion of time spent by the district court in deciding defense motions (see page 21, *supra*). The conflict over the proper treatment of time attributable to defendants' appeals, which is related to the treatment of government appeal time, should be resolved by this Court.

3. Finally, even if the court of appeals were correct in including appeal time within the length of delay, the court seriously erred in its applying the *Barker* v. *Wingo* balancing test to the facts of this case. The court of appeals' departure from the correct standard is so fundamental—and so closely related to its erroneous treatment of the time attributable to the government's and respondents' appeals [19]—that review by this Court is warranted.

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[19] As we have noted (page 13 & note 11, *supra*) the proper treatment of appeal time is either to exclude it entirely from the length of delay, or to excuse it or weigh it against the defendant as part of the reasons for delay, the second *Barker* v. *Wingo* factor, which is "[c]losely related to length of delay" (407 U.S. at 531).

Although the length of delay is but one of four relevant factors, the court of appeals gave almost conclusive weight to it (App. 17a). While we have argued above that a substantial portion of this delay—75 out of a total of 90 months—should be excluded altogether from the speedy trial analysis, even if it is included its significance must be substantially discounted by consideration of the other three factors. The reasons for the delay attributable to the government's appeals were clearly justifiable. After all, the government prevailed on those appeals. It is surely a Pyrrhic victory to be proven correct on appeal only to face, on remand, dismissal under the Speedy Trial Clause. And the time spent on respondents' own unsuccessful interlocutory appeal must, on any reasonable analysis, weigh heavily against them.

Prejudice to respondents is almost entirely absent here. In view of the fact that respondents "were incarcerated only for short periods, and were released without restriction during almost all of the period of delay" (App. 16a), the court below was able to conclude only that respondents had suffered "some" personal prejudice (*ibid.*). The court's conclusion (*id.* at 16a-17a) that respondents had suffered prejudice to their defense by the deaths and fading memories of witnesses is wholly speculative and ignores the simplicity of the underlying facts in this case. Respondents were caught red-handed, apprehended in the act of committing the crimes with which they were charged and in possession of the principal items of evidence that would be used to prove the government's case. Whatever prejudice has been caused by

the passage of time has been to the government's detriment, not respondents'.

The final factor, and the one that conclusively demonstrates the absence of a constitutional violation here, is respondents' obvious desire to avoid trial. The Court emphasized the importance of a defendant's desire to obtain a speedy trial in *Barker* v. *Wingo* (407 U.S. at 532, 536):

> We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.
>
> * * * * *
>
> [B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates * * * that the defendant did not want a speedy trial.

This case presents just such a record. Despite their pro forma demands for a speedy trial,[20] it must be obvious that, far from seeking trial at the earliest possible date, respondents were, from the very beginning, doing everything in their power to delay facing a trial (where, in light of the strength of the government's case, they would have little chance of prevailing). In addition to filing a plethora of pretrial motions at the beginning of the case as well as after

[20] Such demands are entitled to no weight. See, *e.g.*, *United States* v. *Jackson*, 508 F.2d at 1004. The courts below erred in relying (App. 15a, 135a) on respondents' expressed desire to go to trial on May 12, 1976—at a time when critical evidence against them had been erroneously suppressed—because the government had already clearly stated that it would not proceed on that date (see page 5, *supra*). Respondents' gratuitous demands therefore do not demonstrate an actual desire to go to trial.

each remand, respondents sought and obtained two continuances of the trial date during 1976 and attempted to obtain a third (C.R. 36, 37, 39, 62, 64; see C.R. 139), and again sought continuances following the court of appeals' remand in 1980 (see page 7, *supra*). Respondents also opposed or failed to join in the government's attempts to expedite the appeals (C.R. R-268, at 2 n.3; 8/12/80 Tr. 192-193).

Most telling are respondents' petitions for rehearing and certiorari following the court of appeals' ruling in favor of the government as to KaMook Banks and dismissal of the other respondents' appeals on the vindictive prosecution claim. That respondents would continue to seek interlocutory appellate review following this Court's dispositive decision in *Hollywood Motor Car Co.*, *supra*, holding that such relief is not available, irrefutably demonstrates respondents' manifest desire to avoid trial. The court of appeals' affirmance of the dismissal of the indictment in this case for violation of the Sixth Amendment cannot be squared with any value underlying the Speedy Trial Clause. See generally *United States* v. *Litton Systems, Inc.*, 722 F.2d at 272 (to hold that defendant's speedy trial right had been violated "would be a distortion and abuse of the right to a speedy trial under the Sixth Amendment, which was never intended to protect those who do everything in their power to delay or defeat the holding of a trial as long as possible").[21]

[21] The district court also held that respondents' due process rights had been violated (App. 129a-130a n.7). Although the court of appeals did not reach this issue, in the interest of preventing further delay and because resolution of the issue is so clear, we submit that it would be appropriate

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1985

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for this Court to rule that there was no due process violation. The Due Process Clause protects the fundamental fairness of the proceeding; in this context, prejudice to the defense and the reasons for the delay are especially important. See *United States* v. *Lovasco*, 431 U.S. at 790, 796. Here, prejudice to respondents was minimal at best, and most of the delay was caused by respondents' own pretrial motions and the resulting appeals. On these facts, the district court's ruling that respondents were entitled to dismissal of the indictment under the Due Process Clause is legally insupportable.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10158

84-1361

No.

Office - Supreme Court, U.S.
FILED
FEB 26 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 83-3067

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, aka KAMOOK BANKS, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted Jan. 4, 1984

Decided Aug. 30, 1984

[As Amended Jan. 29, 1985]

Before WALLACE and CANBY, Circuit Judges, and CRAIG, District Judge.*

---

* The Honorable Walter Early Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

CANBY, Circuit Judge:

This is the third interlocutory appeal arising from the government's efforts to prosecute these defendants. Although it has been more than eight years since defendants were originally arrested and indicted, they still have not been brought to trial so that their guilt or innocence may be determined. We are now asked to decide whether the delay in bringing defendants to trial has violated their constitutional right to a speedy trial.

I.

The facts giving rise to the present charges and the first two appeals in this case are adequately set forth in our two previous opinions. *See United States v. Banks*, 682 F.2d 841, 842-44 (9th Cir. 1982), *cert. denied*, 459 U.S. 1117, 103 S.Ct. 755, 74 L.Ed.2d 972 (1983); *United States v. Loud Hawk*, 628 F.2d 1139, 1141-43 (9th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1279, 63 L.Ed.2d 602 (1980). We merely summarize them here.

Defendants were arrested on November 14, 1975, after being stopped by the Oregon State Police on the basis of information supplied by the FBI. A search of defendants' vehicles pursuant to a valid search warrant uncovered several firearms, a quantity of what police believed to be dynamite, and apparatus for the manufacture of time bombs. Rather than preserving the dynamite or transferring it to a place of safekeeping, the state authorities decided to destroy it without notification to defendants.

On December 22, 1975, a federal grand jury returned a five-count superseding indictment. The first three counts related to defendants' alleged possession of dynamite (the dynamite counts), and the fourth

and fifth charged defendants with unlawful possession of firearms (the nondynamite counts). Prior to trial, defendants successfully moved for suppression of any evidence relating to the destroyed dynamite. The government sought immediate review of the suppression order under 18 U.S.C. § 3731. The district court, however, denied the government's request for a continuance to permit it to pursue its appeal of the suppression order, and ordered that trial proceed as scheduled on May 12, 1976. When the day for trial arrived, the government announced it was not ready. Because of the unwillingness of the government to proceed to trial, the district court, acting pursuant to Fed. R. Crim. P. 48(b), dismissed the indictment with prejudice for unnecessary delay. The government filed its notice of appeal in open court on the same day.

We consolidated the two appeals, and a panel of this court initially affirmed the dismissal. However, at the instance of the government, we voted to take the appeal en banc and reversed the suppression order. In analyzing the propriety of the district court's order dismissing the indictment, we examined the dynamite counts and the nondynamite counts separately. As to the former, we held that the delay necessitated by the government's appeal of the suppression order had not been "unnecessary" for purposes of Rule 48(b). *United States v. Loud Hawk*, 628 F.2d at 1149-50. Rather, we reasoned that the delay was necessary to the meaningful exercise of the government's statutory right to appeal the suppression order. As to the nondynamite counts, however, we held that the delay had been "unnecessary" because the suppression of evidence relating to dynamite had nothing to do with the nondynamite

charges, which could have proceeded to trial. *Id.* at 1150. Nevertheless, we decided that dismissal of the nondynamite counts *with prejudice* was inappropriate because the government had not been forewarned that dismissal with prejudice would result from a failure to proceed with the prosecution. *Id.* at 1151. Accordingly, we ordered denial of defendants' motion to suppress, reinstatement of the dynamite counts, and reconsideration of the dismissal of the nondynamite counts insofar as the dismissal was with prejudice. Following denial of certiorari, our mandate issued on March 12, 1980, three years and ten months after the indictment had been dismissed by the district court and appeal taken therefrom by the government.

On remand, the district court, at the urging of defendants, ruled that the nondynamite counts could not simply be reinstated. Consequently, the government was compelled to go back before the grand jury and seek a second superseding indictment. The indictment which resulted was returned on June 18, 1980. It again charged defendants with four of the five original counts in the first superseding indictment and in addition charged defendants with three new counts. The addition of these new counts precipitated a defense motion to dismiss the indictment for vindictive prosecution. On August 8, 1980, the district court granted the motion as to KaMook Banks and dismissed all counts in the indictment pertaining to her. The motion as to the other defendants, however, was denied. The government appealed the dismissal as to KaMook Banks, and the other defendants appealed the denial of the motion as to them. We reversed the dismissal as to KaMook Banks, except that we upheld the dismissal of the added count; we ordered all but the added count reinstated. *United*

States v. Banks, 682 F.2d at 846. As to the other defendants, we dismissed the appeal for lack of jurisdiction. *Id.* at 844. We denied defendant's request for rehearing, and the Supreme Court refused certiorari. Our mandate issued on January 31, 1983, two years, five months after appeal was taken from the district court's order and seven years, two months, and seventeen days after defendants were arrested.

Trial was rescheduled to being on April 11, 1983. The government, however, successfully obtained a continuance, over the objection of defendants, until May 3, 1983. Subsequently, the court on its own motion continued the trial date until May 23, 1983. The trial was then rescheduled for June 13, 1983, for reasons not known to this court. Defendants objected to each of these continuances.

On March 21, 1983, the defendants moved for dismissal on the ground that the delay in bringing them to trial violated their right to a speedy trial guaranteed by the sixth amendment. By order of May 20, 1983, the district court granted defendants' motion and dismissed the indictment with prejudice. It concluded that the appropriate period within which to assess whether defendants had been denied their speedy trial right was the entire ninety-one month period between November 14, 1975 when defendants were arrested and June 13, 1983 when trial was finally set to begin. It reasoned that the entire period of delay should be analyzed under the speedy trial clause of the sixth amendment, rather than under the due process clause of the fifth amendment, because at all times during this period defendants were "accused" persons. Finding that the majority of the delay in this case was attributable to the two interlocutory appeals, the district court concluded that the

seventy-five months consumed by the two appeals must be weighed against the government. Moreover, it found that defendants had adequately asserted their right to a speedy trial, and that they had been prejudiced by having to live with unresolved criminal charges for more than seven and one-half years and by impairment of their ability to defend themselves.

II.

Although the right to a speedy trial asserted by defendants is "one of the most basic rights preserved by our Constitution," *Klopfer v. North Carolina*, 386 U.S. 213, 226, 87 S.Ct. 988, 995, 18 L.Ed.2d 1 (1967), no per se test has been devised to determine when the right has been violated. Instead, we must apply a rather flexible "functional approach" that attempts to give proper weight to the various interests at stake. *Barker v. Wingo*, 407 U.S. 514, 522, 92 S.Ct. 2182, 2187, 33 L.Ed.2d 101 (1972). The primary factors to be considered are the length of the delay, the reasons for the delay, the degree to which defendants asserted their right to a speedy trial, and the extent of prejudice to the defendants caused by the delay. *Id.* at 530-33, 92 S.Ct. at 2191-93.

A. Length of Delay

In order to determine the length of delay for sixth amendment purposes, we must know when to begin counting and when, if ever, to interrupt counting. It is clear enough that the speedy trial clause does not apply "before a defendant is indicted, arrested, or otherwise officially accused." *United States v. MacDonald*, 456 U.S. 1, 6 (1982) (citing *United States v. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 459, 30 L Ed. 2d 468 (1971)). We begin our count, therefore, with defendants' arrest on November 14, 1975. The question then is whether, and for what purposes, we must interrupt it.

The government first contends that we must exclude the periods during the interlocutory appeals when the indictments had been dismissed and not yet reinstated. During the first interlocutory appeal, the indictment was dismissed as to all defendants on May 12, 1976, and a superseding indictment was not returned until June 18, 1980. During the second interlocutory appeal, the superseding indictment was dismissed as to KaMook Banks on August 8, 1980, and was not reinstated as to her until our mandate issued on January 31, 1983.[1] The government contends that these periods must be excluded on the authority of *United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982).

In *MacDonald*, the Supreme Court held that the sixth amendment speedy trial clause did not apply to delay during the period after charges were formally dropped by the government and before renewed charges were brought. It based this holding on the purposes of the sixth amendment, in contrast to those of the due process clause of the fifth amendment:

> The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by the passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to mini-

[1] The *MacDonald* rationale cannot be applied as far as the second appeal concerns the other defendants because the second superseding indictment remained pending as to them during the time spent on their appeal.

> mize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

Id. at 8, 102 S.Ct. at 1502. Because the formal dropping of charges by the government removes the disabilities with which the sixth amendment is concerned, it is no longer appropriate to apply that amendment. *Id.* at 8-9, 102 S.Ct. at 1502. Delay while no charges are pending is similar to delay prior to indictment, and is to be measured by the due process standard application to pre-indictment delay. *Id.* Due process is not violated unless the delay has caused actual prejudice to the conduct of the defense. *United States v. Marion*, 404 U.S. 307, 325-26, 92 S.Ct. 455, 465-66, 30 L.Ed.2d 468 (1971). No such prejudice need be demonstrated as an essential prerequisite of a sixth amendment claim. *Moore v. Arizona*, 414 U.S. 25, 26, 94 S.Ct. 188, 189, 38 L.Ed.2d 183 (1973) (per curiam).

We accept, of course, these controlling principles, but we do not find them applicable here because our case is different from *MacDonald*. When the government voluntarily dismisses pending charges, "a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation." *MacDonald*, 456 U.S. at 9, 102 S.Ct. at 1502 (quoting *Marion*, 404 U.S. at 321, 92 S.Ct. at 464). The situation is quite the contrary in the present case, where the indictments were dismissed over the government's opposition and the government vigorously and successfully sought to have them reinstated on appeal. While those appeals were pending, the defendants were subject to

precisely the burdens that the sixth amendment was designed to protect against.

It is true that defendants were not incarcerated or subjected to other restrictions on their liberty during the time when the indictments had been dismissed. They were, however, subject to the imposition of such restraints at any time. Their freedom was far more precarious than that of a person merely subject to investigation but not indicted.

Most important, however, is the fact that defendants' interest in minimizing "the disruption of life caused by arrest and the presence of unresolved criminal charges," *id.* at 8, 102 S.Ct. at 1502, continued unabated during the interlocutory appeals. A formal accusation, as by arrest, "may seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obliquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 320, 92 S.Ct. at 463. The public accusation in this case clearly maintained its force while the government prosecuted the appeals in order to reinstate the charges against the defendants. The appeals unequivocally stated the government's intention to continue the prosecution and asserted its legal grounds for doing so. Because the government's appeals after dismissal of the indictment bore the indicia and imposed the disabilities of continued, formal public accusation, we cannot escape the conclusion that the defendants remained "accused" during the periods when the government was appealing the dismissals of their indictment.[2]

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[2] *United States v. Ciammitti*, 720 F.2d 927 (6th Cir. 1983), on which the government relies, is not contrary to our hold-

The government next contends that, in any event, the period consumed by the government's own interlocutory appeals should be excluded, because otherwise the government's "absolute right" to appeal would be impaired. The government grounds this right in 18 U.S.C. § 3731, which authorizes appeals by the government from district court orders dismissing indictments or granting motions to suppress evidence.

Certainly the government is entitled to protection of its statutory right of appeal. *See United States v. Booth*, 669 F.2d 1231, 1241 (9th Cir. 1981). In our view, however, it accords too little respect to the right of speedy trial secured by the sixth amendment to exclude entirely from consideration the time spent on the government's interlocutory appeals. If such appeals are not even counted in the period of delay, then "speedy" trials could be postponed for years or decades, no matter how onerous the burdens borne by the defendants in the meantime, and the sixth amendment would not even be implicated. We reject such a per se approach to the problem of delay caused by interlocutory appeals.

It is true that two courts of appeals seem to have adopted the government's position. *United States v. Jackson*, 508 F.2d 1001, 1004-05 (7th Cir. 1975); *United States v. Bishton*, 463 F.2d 887, 890 (D.C. Cir. 1972). Those cases did, however, admit of an

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ing. There the government did not appeal the court-ordered dismissal. During the period after dismissal and prior to indictment, no charges were pending against defendants and no appeal was being prosecuted. Defendants were therefore not subject to the imposition of any restraints on their freedom and were not the subject of any public accusation of guilt.

exception when the government's appeal was taken in bad faith, by neglect, or for purposes of delay. *Id.*; *see United States v. Saintil*, 705 F.2d 415, 418-19 (11th Cir. 1983). The periods of delay involved were also much shorter than those present here. Even so, it seems analytically more sound to count the time taken by the government's appeal within the period of delay, and then to assess the justifications for that appeal under the second step of the *Barker v. Wingo* analysis: that dealing with "reasons for the delay." The importance of protecting the government's statutory right of appeal in a given case can be weighed and ultimately placed in the balance against the damage to defendants' sixth amendment interest. This latter, more flexible methodology appears to have been the one selected by the Fifth Circuit in *United States v. Herman*, 576 F.2d 1139, 1146 (5th Cir. 1978), and we prefer it.[3]

We therefore calculate the delay in this case as ninety months, the period from the arrest of defendants until their indictment was last dismissed on May 20, 1983,[4] some three weeks before their trial was scheduled to begin. Ninety months is by any account an extreme delay and by its very immensity must weigh heavily in the ultimate balance. Since

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[3] This court seems to have applied the same approach as the Fifth Circuit, without extended discussion, in *United States v. Cox*, 475 F.2d 837, 841 (9th Cir. 1973); *see United States v. Osuna-Sanchez*, 446 F.2d 566, 567 (9th Cir. 1971), *cert. denied*, 404 U.S. 1022, 92 S.Ct. 698, 30 L.Ed.2d 672 (1972).

[4] We select May 20, 1983, as the ending date because it is the date of the order of the district court that is the subject of this appeal. We must review that order to determine whether it was correct when made.

this ninety-month delay is without question "presumptively prejudicial," we proceed to the remaining three steps of the *Barker v. Wingo* analysis.

B. Reasons for the Delay

Seventy-five months of the delay in this case can be attributed to the two interlocutory appeals. The first appeal taken by the government consumed forty-six months; the second, in which both sides appealed, consumed twenty-nine months. Our task is to examine the reasons for these delays and to determine the degree to which they weigh against or in favor of the government. *Barker v. Wingo*, 407 U.S. at 531, 92 S.Ct. at 2192.

In assessing the delay attending the first appeal, we address the dynamite counts and the nondynamite counts separately. With respect to the nondynamite counts, the delay for the interlocutory appeal was wholly unnecessary, as we pointed out in *United States v. Loud Hawk*, 628 F.2d at 1150. The government appealed to overturn the order of the district court suppressing evidence relating to the dynamite; there was no reason why the government could not have gone forward with prosecution of the nondynamite charges. While a single trial doubtless would have been more convenient for the government, that convenience must be judged a slight reason for incurring the substantial delay of forty-six months. The postponement of trial of the nondynamite charges during the first appeal consequently weighs heavily against the government.

The government's reasons for appealing the suppression order relating to the dynamite charges are substantial, in light of "the necessity of the appealed question to the government's case, the strength of the

government's position on that issue, and the seriousness of the crime." *United States v. Herman*, 576 F.2d at 1146. The suppressed evidence was crucial to the government's case on the dynamite charges. The strength of the government's position was demonstrated by its success in the appeal. The crimes charged were serious. The government's action in taking the appeal was therefore clearly justified, and would of itself support a reasonable delay. The problem is that this appeal took forty-six months.

While some of this appellate delay can be attributed to defendant's unsuccessful petition for certiorari,[5] most of the delay must be attributed to the processes of this court. Even in light of the heavy docket and limited membership of this court at that time, and of the fact that the difficult issues presented were ultimately taken en banc, the appeal took an extraordinarily long period of time. The government, of course, could do nothing about that problem. It is therefore a "neutral" reason for delay, similar to congestion in the trial court. *See Barker v. Wingo*, 407 U.S. at 531, 92 S.Ct. at 2192. Such neutral reasons, however, are to be weighed against the government, although not as heavily as some others, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* In other words, courts can deprive defendants of the right of speedy trial just as prosecutors can. The forty-six month delay attending the government's appeal of the suppression order consequently weighs against the government.

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[5] Defendants' petitions for rehearing and certiorari consumed only six months. The delay attributable to this factor is insignificant in the context of a total delay of forty-six months.

The second interlocutory appeal took twenty-nine months. Three of the defendants appealed the district court's order denying their motion to dismiss for vindictive prosecution. The government appealed the dismissal of the indictment as to KaMook Banks. Again, the government's appeal was justified and it succeeded in obtaining the relief it sought.

Three of the defendants were themselves appellants in the second interlocutory appeal. Authority provides little guidance for evaluation of delay caused by defendants' appeals, but the same elements appear to be relevant. In applying them, however, care must be taken to guard against defendants' manufacturing delay for purposes of a later speedy trial claim. Appeals taken in bad faith or for purposes of delay must weigh against defendants in the sixth amendment balance, as should appeals taken with little merit or hope of success. The interlocutory appeals taken by defendants here have not been shown to have been taken in bad faith or for delay. They were dismissed ultimately as improper interlocutory appeals, but that result was dictated by the intervening decision of *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982). At the time the appeals were taken, the law of this circuit permitted appeals from an order denying dismissal on grounds of vindictive prosecution. *United States v. Burt*, 619 F.2d 831 (9th Cir. 1980). While defendants were not compelled to appeal prior to trial under the circuit law, they had a right to do so, and that right is entitled to protection. The issue being appealed was certainly important to their defense. Their appeal was justifiable, and we conclude that the delay attending it in this court should therefore not be weighed against defendants.

We also conclude, however, that the time taken for normal handling of the appeal that defendants elect to pursue before trial ought not to weigh against the government either. If the court's own processes unduly delay the appeal, that "neutral" reason must weigh lightly against the government. There was no such undue delay here in the twenty-three months from notice of appeal to decision by this court. To that point, therefore, the reasons for the delay caused by defendants' interlocutory appeal weigh for or against neither side.

The additional delay of six months that occurred as a result of the defendants seeking certiorari from the judgment of this court dismissing the appeal cannot be viewed as neutral. In light of the recent decision of *Hollywood Motor Car Co.* by the Supreme Court, and in light of this court's total reliance on it, the chances of defendants' obtaining review by certiorari were virtually nil. That portion of the delay must be wholly excused.

C. Assertion of Speedy Trial Right

The district court found that the defendants objected to the delay as early as May 12, 1976, when the government announced that it was not ready to proceed to trial. After each remand from this court, defendants moved the district court to dismiss the indictment on the grounds of unnecessary delay and violation of their speedy trial right. Finally, defendants objected to every continuance of their trial date after the last remand. These assertions of defendants are "entitled to strong evidentiary weight" in determining whether their rights to a speedy trial have been denied. *Barker v. Wingo*, 407 U.S. at 531-32, 92 S.Ct. at 2192-93.

D. Prejudice to Defendants

The kind of prejudice that the speedy trial clause is primarily intended to prevent is personal prejudice: "lengthy incarceration prior to trial, . . . the lesser, but nevertheless substantial impairment of liberty imposed on an accused while released on bail, and . . . the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502. The defendants here were incarcerated only for short periods, and were released without restriction during almost all of the period of delay. They have had to live for seven and one-half years with the anxiety of unresolved criminal charges, and the social disruption that accompanies that condition. They have therefore suffered some personal prejudice.

The district court also found that defendants had suffered prejudice to the conduct of their defense because of the inordinate delay. While prejudice to the defense is not the primary concern of the speedy trial clause, it is not irrelevant. *See Barker v. Wingo*, 407 U.S. at 532, 92 S.Ct. at 2193.[6] The district court based its finding of prejudice on the fact that witnesses had died and at least two others no longer

[6] We do not regard *United States v. MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502, to have overruled *sub silentio* that part of *Barker v. Wingo* that renders prejudice to the conduct of the defense a relevant consideration. *MacDonald* emphasized that the sixth amendment is not "*primarily* intended to prevent prejudice to the defense caused by passage of time." *MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502 (emphasis added). *MacDonald* neither held nor, we think, intended that prejudice to the defense could never be a factor in sixth amendment speedy trial analysis. *See id.* at 23, 102 S.Ct. at 1509 (Marshall, J., dissenting).

recalled the events in issue. The government contends that there is no showing that these witnesses would have been favorable to the defense, and also argues the defendants made no attempt to depose the witnesses.

The showing of prejudice to the defense is somewhat speculative, partly because of the inherent difficulty of predicting the effect of the death or loss of memory of witnesses on a trial not yet held. *See United States v. MacDonald*, 435 U.S. 850, 858-59, 98 S.Ct. 1547, 1551-52, 56 L.Ed.2d 18 (1978). We therefore place little weight on this factor in the *Barker v. Wingo* balance. We do not, however, discount entirely the impairment of a fair trial that may well result from the absence or loss of memory of witnesses in this case. *See Barker v. Wingo*, 407 U.S. at 532, 92 S.Ct. at 2193; *United States v. Macino*, 486 F.2d 750, 754 (7th Cir. 1973). We also note, once again that prejudice to the defense is not an essential element of a sixth amendment speedy trial claim. *Moore v. Arizona*, 414 U.S. at 26, 94 S.Ct. at 189.

III.

Balancing the four *Barker v. Wingo* factors to determine whether there has been a violation of the sixth amendment is far from an exact science. None of the factors is "either a necessary or sufficient condition to the finding of a deprivation of the right." *Barker v. Wingo*, 407 U.S. at 533, 92 S.Ct. at 2193. After weighing all four factors, however, we conclude that defendants' speedy trial right has been violated.

The most weighty factor by far is the length of delay. We are confronted with a seven and one-half year delay (which incidentally would become closer to nine years if we remanded for trial). The Supreme

Court in *Barker v. Wingo* described the five year delay there as "extraordinary" and found the case to be "close" even though there was a minimal showing of prejudice and the defendant did not want a speedy trial. The far longer delay here is more than enough to tip the balance in the circumstances of this case.

> It is manifest that prejudice, always a difficult thing to ascertain, must, at some point, be presumed to result from an inordinate delay in bringing a defendant to trial. Exactly where that point lies on the spectrum of pretrial delay is uncertain, but it is clear that the longer the delay, the heavier the weight to be given it in the balance.

United States v. Macino, 486 F.2d 750, 752 (7th Cir. 1973); *see United States v. Holt*, 448 F.2d 1108, 1109 (D.C. Cir.), *cert. denied*, 404 U.S. 942, 92 S.Ct. 292, 30 L.Ed.2d 256 (1971).

The other three *Barker v. Wingo* factors also contribute, on balance, to our conclusion that defendants' speedy trial rights have been violated in this case. The reasons for a large part of the delay weigh against the government, even though to a substantial degree it was court delay. The defendants asserted their rights to a speedy trial. Finally, personal prejudice, while minimal in comparison with that resulting from lengthy incarceration, was nevertheless present. Prejudice to the conduct of the defense is also likely, but the balance tips sharply in defendants' favor without it.

The district court was correct in concluding that trial would violate the sixth amendment rights of the defendants. Its order dismissing the indictment with prejudice is AFFIRMED.

WALLACE, Circuit Judge, dissenting:

I dissent. The majority has misconstrued *United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982) (*MacDonald*), which applies in this case to exclude from the sixth amendment measurement of speedy trial the periods between live indictments against the defendants.

I

The majority observes that the speedy trial clause did not apply in *MacDonald* between the government's good faith voluntary dismissal of military charges and a subsequent civil indictment. This does not mean, as the majority holds, that *MacDonald* fails to apply to involuntary dismissals or dismissals from which the government appeals. The Supreme Court, in a general statement of its holding, said: "Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause." *Id.* at 7, 102 S.Ct. at 1501. Nowhere in the remainder of its opinion is there any hint that the Court meant only voluntary dismissals. *See id.* at 7-11, 102 S.Ct. at 1501-1503. On the contrary, in a footnote it commented "[o]ur holding agrees with . . . the Speedy Trial Act of 1974, . . . that if charges are initially dismissed and later reinstated, the period between the dismissal and the reinstatement is not to be included in computing the time within which a trial must commence. 18 U.S.C. §§ 3161(d), 3161(h)(6)." 456 U.S. at 7 n.7, 102 S.Ct. at 1501 n.7. Section 3161(h)(6) applies only to voluntary dismissals by the government. Section 3161(d), however, applies to dismissals on the motion of a defendant, "any charge

contained in a complaint filed against an individual . . . dismissed or otherwise dropped," and dismissals "by a trial court and reinstated following an appeal." For the *MacDonald* holding to agree, as it says it does, with section 3161(d), the theory of its holding must include dismissals other than voluntary dismissals by the government.

Later in the same footnote, the Supreme Court cited with apparent approval a number of Speedy Trial Act cases that excluded the period after dismissal of initial charges in counting time. *See* 456 U.S. at 7-8, n.7, 102 S.Ct. at 1501-1502 n.7. Among them was *United States v. Bishton*, 463 F.2d 887 (D.C. Cir. 1972), where the government charged the defendant in the District of Columbia Court of General Sessions, appealed and lost after dismissal of the charges, and then brought the same charges in federal district court. *See id.* at 889, 891. This citation reinforces the clear meaning of *MacDonald*: delay after a dismissal of charges does not normally count for sixth amendment speedy trial purposes.

Applying the *MacDonald* rule to this case, the period from November 14, 1975 to May 12, 1976 counts for sixth amendment purposes for all defendants. A live indictment stood against them during that six-month period from arrest to dismissal of the indictment with prejudice. The period from March 12, 1980 (for the dynamite matters) and June 18, 1980 (for the nondynamite matters) to May 30, 1983 counts for sixth amendment purposes for all defendants except KaMook Banks. Live indictments stood against those defendants during that roughly three-year period from our reinstatement of the dynamite counts and the superseding indictment's reinstatement of the nondynamite counts until dismissal of the

indictment with prejudice again. The time between 1976 and 1980 when no live indictment stood against the defendants after the first dismissal with prejudice does not count for sixth amendment purposes under the *MacDonald* rule. The time between August 30, 1980 and January 31, 1983, when no live indictments stood against Kamook Banks does not count as to her for sixth amendment purposes under *MacDonald*. Thus, the speedy trial clause time for most of the defendants totaled approximately three and a half years. The speedy trial clause time for Kamook Banks totaled slightly more than one year.

According to *MacDonald*, the sixth amendment guarantee of a speedy trial "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." 456 U.S. at 8. These concerns did not apply to the defendants during the times after dismissals when no live indictments were outstanding against them. They were not incarcerated then. They were not hobbled by bail then. They were not under arrest then. Had the district court imposed bail pending the appeals, *see* 18 U.S.C. § 3731, that restriction might have triggered the running of time for purposes of the speedy trial clause, but the defendants did not have to post bail. These facts indicate that excluding the times after dismissal when no live indictments stood against the defendants in this case comports both with the letter of the *MacDonald* rule and the purposes of the sixth amendment.

The majority argues that because the defendants "were . . . subject to the imposition of such restraints

at any time" during the appeals of the dismissed indictments, the sixth amendment applies to those periods. That contention is inconsistent with *MacDonald* where the Supreme Court distinguished *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967) (*Klopfer*), on grounds that the prosecutor in that case could activate the charges and restore the case for trial " 'without further order' of the court." *MacDonald*, 456 U.S. at 8-9, n.8, 102 S.Ct. at 1502, n.8, *quoting Klopfer*, 386 U.S. at 214, 87 S.Ct. at 989. Contrary to *Klopfer*, imposition of restraints pending appeal on the defendants in this case would require " 'further order' of the court." They were in essentially no worse position than before their first arrest when the government had discovered probable cause but not yet successfully acted on it.

The Constitution provides "the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. The Supreme Court recently stated in *United States v. Gouveia*, —— U.S. ——, ——, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984) (citations omitted) (*Gouveia*), that this right "may attach before an indictment and as early as the time of 'arrest and holding to answer a criminal charge.' " But even *Gouveia* does not assist the defendants because the most public investigation, promise to prosecute, or government statement of criminal conduct does not reach the required threshold; the government had not imposed its formal power directly on any alleged wrongdoer. As *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971) (emphasis added) (*Marion*), holds: "it is either a *formal* indictment or information or else the *actual* restraints imposed by arrest and holding to answer a criminal charge that engaged the particular protec-

tions of the speedy trial provision . . . ." *Accord, e.g., United States v. Mills*, 641 F.2d 785, 787 (9th Cir.), *cert. denied*, 454 U.S. 902, 102 S.Ct. 409, 70 L.Ed.2d 221 (1981). The government's public intent to prosecute and its efforts on appeal to obtain the legal authority to do so did not constitute an exercise of *formal* power directly on the alleged wrongdoers. Because the government did not seek bail, no *actual* restraints were imposed. By misreading *MacDonald*, the majority has incorrectly extended the sixth amendment beyond these limits imposed by the Supreme Court.

II

Even after properly excluding part of the delay in this case under the *MacDonald* rule, a clear sixth amendment question remains. Three and a half years, the relevant period for most of the defendants, is a suspect delay. *See Moore v. Arizona*, 414 U.S. 25, 27, 94 S.Ct. 188, 190, 38 L.Ed.2d 183 (1973). One year, the relevant period for Kamook Banks, is less suspect but I will assume for purposes of this appeal that it is also adequate to trigger the balancing test of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (*Barker*). *See id.* at 530-31 & n.31, 92 S.Ct. at 2191-92 & n.31.

In *Barker*, the Supreme Court identified four major factors for resolving a constitutional speedy trial claim. "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530, 92 S.Ct. at 2192. Since *Barker*, the Supreme Court has reduced the last of these factors—prejudice—to, at best, minimal importance. *See MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502. As foreshadowed as long ago as *Marion*, *see*

404 U.S. at 324, 92 S.Ct. at 465, "prejudice to the defense caused by passage of time . . . is protected primarily by the Due Process Clause and by statutes of limitations," *MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502. *See also, e.g., United States v. Lovasco*, 431 U.S. 783, 788-89, 97 S.Ct. 2044, 2047-48, 52 L.Ed.2d 752 (1977); Fed. R. Crim. P. 48(b).

The defendants in this case adequately asserted their rights to a speedy trial. As a result, the length of delay and reasons for delay amount to the most important factors for speedy trial analysis. Of the three and a half year period applicable to most of the defendants, almost two years involved their own appeal from the district court's denial of their motion to dismiss for vindictive prosecution. As the majority must concede, this period should not weigh against the government. The majority must also concede that the six months wasted by the defendants seeking rehearing en banc and certiorari in the face of new, directly controlling Supreme Court precedent, *e.g., United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982), at least cannot weigh against the government. Such essentially frivolous petitions, *see generally, e.g.*, Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 616-21, 622-23 (1984), should weigh against the defendants. But even considering that six month period as neutral, only one year remains that might possibly weigh against the government. Of that period, forty-one days are attributable to a trial date continuance ordered by the district court on its own motion. Given the complexity of this case, the time necessary to prepare all trial matters and the additional time necessary to prepare for trial again after interlocutory appeal, I cannot say that, on balance,

this one year of delay violated the defendants' sixth amendment rights to a speedy trial.

Kamook Banks's case is less close. Of the slightly more than one year relevant to sixth amendment analysis, she wasted a good portion seeking certiorari along with the other defendants. I cannot say the remaining period violated her sixth amendment right to a speedy trial.

III

Because the district court failed to apply the *MacDonald* rule to exclude for sixth amendment purposes the periods between live indictments against the defendants, we should at least remand for reconsideration. The district court abused its discretion, *see United States v. Mills*, 641 F.2d at 787; *United States v. Simmons*, 536 F.2d 827, 832 (9th Cir.), *cert. denied*, 429 U.S. 854, 97 S.Ct. 148, 50 L.Ed.2d 130 (1976), by dismissing the last indictment on speedy trial grounds based on such an erroneous calculation of delay. Because I find the record sufficient to conclude that the remaining delays are largely excusable under the balancing test of *Barker*, I would prefer not to delay the resolution of this case further but to reverse and remand for trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 80-1574, 80-1582, 80-1583 and 80-1630

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DENNIS JAMES BANKS, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RUSS REDNER, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

KENNETH MOSES LOUD HAWK, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KA-MOOK BANKS, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted Jan. 7, 1981
Decided July 29, 1982
Rehearing and Rehearing En Banc Denied
Oct. 5, 1982

Before KENNEDY, FERGUSON and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge.

Defendants Dennis Banks, Russ Redner and Kenneth Moses Loud Hawk appeal from an order of the district court denying their motion to dismiss their indictment on the ground of vindictive prosecution. The Government cross-appeals from the same order, which dismissed the entire indictment as to defendant Ka-Mook Banks. However, the Government does not contest the district court's dismissal of Count VII of the indictment as to Ka-Mook Banks,[1] *see* Opening Brief of Plaintiff-Appellant 38 n.22;[2] rather, the Government contends only that it was error for the district court to dismiss the entire indictment against Ka-Mook Banks where the court's finding of an undispelled appearance of vindictiveness was based solely on the addition of one new count to a superseding indictment. The events leading to the initiation of this

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[1] Count VII of the indictment is applicable only to Ka-Mook Banks and Count VI is applicable only to Dennis Banks. Counts I through V of the indictment are applicable to all defendants. See *infra* note 4.

[2] The United States' brief states that "the Government is not appealing the district court's ruling on the new gun count." The Government's explanation for its decision is its desire "to avoid further complicating this appeal and in the interest of avoiding further delay in this already protracted litigation . . . ."

prosecution more than five years ago are recounted in detail in the court's previous *en banc* decision. *United States v. Loud Hawk*, 628 F.2d 1139, 1141-44 (9th Cir. 1979) (*en banc*), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1279, 63 L.Ed.2d 602 (1980).

Loud Hawk, Redner, and Ka-Mook Banks were arrested by Oregon state police in November of 1975, after the FBI had notified Oregon authorities of their possible presence in the state. The vehicles in which the appellants were travelling were impounded and subsequently searched pursuant to a state warrant. The search disclosed firearms, ammunition, one electric blasting cap, a large quantity of non-electric blasting caps, and material thought by state police conducting the search to be dynamite. *United States v. Loud Hawk*, 628 F.2d at 1142-46. State authorities subsequently decided that the explosive material should be destroyed, and this was done in the presence of an FBI agent, who photographed the process.

A five count superseding indictment was brought on December 22, 1975, charging all defendants with three counts relating to possession and transportation in commerce of an unregistered destructive device and one count of transporting firearms, and charging Dennis Banks alone with one count of being a felon in possession of firearms. Two days later the defendants filed a motion seeking dismissal of the indictment, or alternatively, suppression of any secondary evidence relating to the alleged destructive device, in light of the destruction of the explosive material which was a significant component thereof. Judge Belloni initially denied this motion, but on reconsideration and after a hearing, he granted the motion to suppress. The Government filed a notice of appeal from this order, and at the same time requested a continuance of the trial date, at that time

less than a month off. The Government argued that a continuance was necessary in order to effectively preserve its right to appeal the suppression order. The motion for a continuance was denied. When the case was called for trial on May 12, 1976, the Government answered not ready; pursuant to Federal Rule of Criminal Procedure 48(b), Judge Belloni dismissed the indictment with prejudice.

The district court's decision was affirmed by a panel of this court. Application for an *en banc* consideration was made and granted, and this court *en banc* remanded to the district court for 45 days for an evidentiary hearing on the nature and extent of the federal government's participation in the destruction of the explosive material. This court retained jurisdiction of the case. Order of Remand, March 6, 1978. The district court held the evidentiary hearing and made findings of fact, as directed in the order of remand. This court, sitting *en banc*, then reviewed the orders of the district court in light of the hearing on remand and reversed both the suppression order and the dismissal of the indictment with prejudice. *United States v. Loud Hawk*, 628 F.2d at 1146-51. In our opinion, we distinguished the counts relating to the destructive device from those involving firearms violations. As to the former, we concluded that it was error to dismiss for "unnecessary delay" under Federal Rule of Criminal Procedure 48(b) where the delay was "necessary to permit the meaningful exercise of [the Government's] statutory right" to appeal under 18 U.S.C. § 3731. *Id.* at 1150. The district court was instructed to reinstate these counts following remand. We stated, however, that this rationale did not encompass the firearms counts. As to those counts, we said that dismissal was proper, but held

that the district court had failed to give the Government the requisite "forewarning . . . that dismissal *with prejudice* will result from a failure to proceed to trial." *Id.* (emphasis added). We thus reversed the dismissal with prejudice and remanded to the district court "for further consideration of its dismissal of these counts in light of this opinion." *Id.* at 1151.

Upon remand, the defendants urged, and the district court subsequently held, that the firearms counts could not simply be reinstated. The Government then decided to obtain a new indictment from the grand jury, which it did on June 18, 1980. The new indictment re-charged Dennis Banks with being a felon in possession of firearms. It also re-charged all of the defendants with the original firearms count (although it substituted "receiving" for "transporting") and two of the original three destructive device counts. However, the new indictment also charged all of the defendants with two new destructive device counts relating to a different type of destructive device.[3] It also charged Ka-Mook Banks with an entirely new count of receiving firearms while under indictment for a felony, (Count VII).

It was this new indictment that prompted the motion to dismiss for vindictive prosecution which we consider here. Judge Redden granted the motion as to appellee Ka-Mook Banks, finding that the Government had failed to dispel the appearance of vindictiveness created by the addition of the new firearms

[3] The destructive device which was the subject of the original indictment and which was recharged in the new indictment was described as containing an "electrical blasting cap," while the destructive device added in the new indictment was described as containing "150 Atlas non-electric blasting caps."

count against her. He denied the motion as to the remaining defendants, finding that the new counts relating to the additional destructive device were "a product of independent judgment of subsequent prosecutors," a circumstance that he concluded dispelled the appearance of vindictiveness.

The Government appeals the dismissal of counts I through V of the indictment as to Ka-Mook Banks. Redner, Loud Hawk and Dennis Banks appeal the denial of their motion to dismiss the indictment as to them. The Government contends that the appearance of vindictiveness was dispelled in Ka-Mook Banks' case because the new indictment was the product of the independent judgment of subsequent prosecutors. The other defendants argue that there was an undispelled appearance of vindictiveness in their cases for the same reason as there was in the case of Ka-Mook Banks, and that the new indictment should be dismissed as to them also.

I

This court does not have jurisdiction under 28 U.S.C. § 1291 to review the district court's interlocutory order refusing to dismiss the indictment on the ground of vindictive prosecution. *United States v. Hollywood Motor Car Co.*, —— U.S. ——, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (per curiam). The appeals of Dennis Banks, Russ Redner, and Kenneth Moses Loud Hawk are dismissed.

II

The district court dismissed all six counts in the indictment pertaining to Ka-Mook Banks because it found that the Government's action in adding an additional count (Count VII) against Ka-Mook Banks in

the new indictment gave rise to the undispelled appearance of vindictiveness. The Government does not contest the dismissal of Count VII, but rather only the dismissal of the remaining counts in the indictment. The Government argues that when the appearance of vindictiveness results from the addition of a new count to a superseding indictment, the proper remedy is to dismiss only the added count and to leave the remaining counts intact. The Government therefore asks that we vacate the portion of the district court's order that dismisses Counts I through V as to Ka-Mook Banks and that those counts be ordered reinstated. We have jurisdiction over the Government's appeal pursuant to 18 U.S.C. § 3731, which provides that "[i]n a criminal case an appeal by the United States shall lie to a court of appeals from a[n] . . . order of a district court dismissing an indictment . . . as to any one or more counts . . . ."

The Government raises the question of the appropriate scope of the remedy for vindictive prosecution in a peculiar procedural setting—a setting that makes it unnecessary for us to reach that troublesome and important question. At the time the district court dismissed the indictment as to Ka-Mook Banks, both the district court and the parties assumed that a pretrial action of the prosecutor that increased the risk of punishment after the exercise of a right by the defendant gave rise, *ipso facto*, to an appearance of vindictiveness, and that dismissal of the indictment was required unless the prosecutor rebutted or dispelled that appearance.[4] After the Government had

[4] The court and the parties properly relied on the law of this circuit as it stood at the time. *See, e.g., United States v. Burt*, 619 F.2d 831 (9th Cir. 1980); *United States v. Griffin*, 617 F.2d 1342 (9th Cir.), *cert. denied*, 449 U.S. 863, 101 S.Ct. 167, 66 L.Ed.2d 80 (1980).

appealed, and the case had been argued, the Supreme Court held in *United States v. Goodwin*, —— U.S. ——, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), that a presumption of vindictiveness was not warranted simply because, prior to an initial trial, the charge against a defendant was increased from a misdemeanor to a felony following the defendant's request for a jury trial.

In rejecting the defendant's argument that a presumption of vindictiveness was warranted whenever the Government had increased the risk of punishment after the defendant had exercised a procedural right, the Court in *Goodwin* emphasized that "[a] prosecutor should remain free *before trial* to exercise the broad discretion entrusted to him to determine the societal interest in prosecution. An initial decision should not freeze future conduct. . . . [T]he initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." *Id.* at ——, 102 S.Ct. at 2493 (emphasis added). The Court distinguished the two cases in which it had applied a presumption of vindictiveness, *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1968) and *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1972), on the ground that both "involved the defendant's exercise of a procedural right that caused a complete retrial." *Id.* —— U.S. at ——, 102 S.Ct. at 2490.

Although the Court in *Goodwin* refused to apply a presumption of vindictiveness to the pretrial actions of the prosecution in that case, the Court recognized

"that a defendant in an appropriate case might objectively prove that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." *Id.* at ——, 102 S.Ct. at 2494. Following the Court's decision in *Goodwin*, we reversed an order dismissing an indictment on the ground of pretrial prosecutorial vindictiveness, *United States v. Gallegos-Curiel*, 681 F.2d 1164 (9th Cir. July 21, 1982), saying "there must be a threshold showing of vindictiveness or the likelihood of it before the court is justified in inquiring into the prosecutor's actual motives." *Id.* at 1169. We held that "an appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights." *Id.* at 1169.

If, as in *Goodwin* and *Gallegos-Curiel*, there is not a reasonable likelihood of vindictiveness when the prosecutor decides to increase charges based on his review of the evidence prior to trial because he has simply come to realize that information possessed by the State has a broader significance," *Goodwin*, —— U.S. at ——, 102 S.Ct. at 2493, there is even less likelihood of vindictiveness when the prosecutor is required by court order to obtain a new indictment. In the latter case the prosecutor will *necessarily* have to review the evidence and reconsider what charges to present to the grand jury.

In this case the prosecutor clearly had a legitimate reason to reconsider the scope and content of the new pretrial indictment. Long after the original indictment was obtained, but before any trial had been held, the Government was compelled by court order to obtain a new indictment and to present witnesses and evidence to a new grand jury. Under these circumstances, we cannot say that there is a "realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or punitive animus toward the defendant . . . ." *Gallegos-Curiel*, at 1169.

We are aware that there have been many hotly contested disagreements between the parties during the lengthy proceedings that have marked the Government's thus far unsuccessful efforts to bring this case to trial. However, our conclusion that the "reasonable likelihood" requirement was not met is buttressed by some of the findings made by the district court at the time of the vindictive prosecution hearing. The district court specifically said "there is no evidence that the Government's action was vindictive *in fact* . . . nor did I find that the Government acted with a malicious or retaliatory motive." Amended Order, August 12, 1980 (emphasis in original). In light of the holdings in *Goodwin* and *Gallegos-Curiel* and the statements of the district court, we conclude, with the benefit of hindsight, that the dismissal of the indictment as to Ka-Mook Banks was erroneous.

As noted above, the Government does not contest the portion of the district court's order dismissing Count VII; rather, the Government asks only that we order Counts I through V reinstated. That portion of the order dismissing Counts I through V as to Ka-Mook Banks is vacated and Counts I through V are hereby ordered reinstated.

Order REVERSED IN PART as to Ka-Mook Banks; appeals of Dennis Banks, Redner, and Loud Hawk are DISMISSED for lack of jurisdiction.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 76-1906, 76-2127

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, LEONARD PELTIER, DENNIS JAMES BANKS, DARLENE PEARL NICHOLS, who gives her true name as KAMOOK BANKS, and ANNA MAE AQUASH, also known as ANNIE MAY PICTOU and NAGUSET EASK, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of Oregon

Aug. 7, 1979

Rehearing Denied Oct. 1, 1979

Certiorari Denied March 3, 1980

See 100 S.Ct. 1279

Before BROWNING, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, KENNEDY, ANDERSON, and HUG, Circuit Judges.*

TRASK, Circuit Judge, files an opinion and the judgment of the court. BROWNING, EUGENE A. WRIGHT, CHOY, WALLACE, J. BLAINE ANDERSON, and KENNEDY, Circuit Judges, concur in the result and in sections I, II, III and VI.

I

On November 13, 1975, Leonard Peltier and companions were thought by the FBI to be traveling across the State of Oregon. Peltier was then a fugitive from the United States authorities and federal officers were attempting to take him into custody. It was thought that he might be traveling with a party of five others and going east. One other who was believed to be in this party of six and thought to be a federal fugitive was Dennis Banks. The events of the siege of Wounded Knee had occurred a short time before,[1] and the government was still in the process of tracking fugitives from that sorry affair.

Desiring to make Oregon State Police aware of this information, the Portland, Oregon FBI office sent a teletype message on that day to all Oregon law enforcement officers which stated that federal fugitives might be traveling through Oregon in a motor home and a station wagon. Both vehicles were described

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* The Honorable Joseph T. Sneed has recused himself from consideration of this matter.

[1] The incident at Wounded Knee, involving a 71 day occupation of the town, had ended May 8, 1973, but there were apparently federal indictments outstanding for some participants, including Peltier and Banks.

and the license number of the motor home was given. The message then stated that if the vehicles were sighted they should not be stopped, but the FBI notified. The next day, on November 14, at about 9:30 p.m., Oregon State Trooper Griffiths sighted the vehicles and verified their description and the license number of the motor home. He proceeded to stop the vehicles. Griffiths had not read the entire bulletin and made the stop under the impression that the bulletin required it. Findings of Fact at 1.[2] He then

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[2] Trooper Griffiths' exact testimony at the remand hearing was as follows:

"MR. TURNER: It's an "all-points bulletin," and it was used by Trooper Griffiths to stop these two vehicles. I might note for the Court that—

"THE COURT: You can read it. The objection is overruled.

"MR. TURNER: Is the offer received, Your Honor?

"THE COURT: Yes, You can read it.

"MR. TURNER: Thank you. Did you—

"THE COURT: That's what you asked him to do, isn't it?

"MR. TURNER: Yes, sir.

"MR. SCHIFFMAN: Just the final portion of it. My objection is if he reads any of it, he read the entire document.

"MR. TURNER: I have no objection to that, Your Honor.

"THE COURT: All right. Well, read the part that the lawyer asked you to read, and on cross-examination if the lawyer wants to read some more, he can do it.

"Q (By Mr. Turner:) Would you read the last line, sir.

"A If vehicle is sighted, do not stop but advise FBI, Portland, immediately for more details."

"Q All right. Mr. Griffiths, did any Federal officer or agent tell you to disregard that portion of the APB?

"A No.

radioed for help and pulled in between the vehicles with his overhead lights flashing. Both vehicles stopped, with the station wagon about 100 yards behind the trooper's car. Trooper Griffiths got out of his car and approached the motor home on the right. He commanded the occupants of the motor home to get out. An Indian male got out, followed by two Indian women and a small child. Griffiths asked if anyone else was inside and they replied "No." At approximately the same moment the motor home accelerated swiftly forward and the man who had gotten out of it fled toward a fence along the highway. As he jumped the fence about 15 yards from the road he fired a shot in the direction of Trooper Griffiths. The trooper returned two shotgun blasts. Both of these shots missed.

As Trooper Griffiths was approaching the motor home, Corporal Kramer, also of the Oregon State Police, who had responded to the call for aid, got out of his patrol car and shined his flashlight into the rear window of the station wagon. Corporal Kramer cautiously approached the left side of the station wagon. When he reached the driver's door he ordered the driver (later identified as defendant Russ James Redner) out of the vehicle and to the

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"Q And could you explain to the Court why you felt it was important to stop these vehicles?

"A The proximity to the state line was a major factor.

"Q Well, how close were you to the state—State of Idaho, I take it?

"A Yes, Several miles.

"Q All right.

"A And it was my decision to stop the vehicles. I felt it had to be done right then.

"Q All right. Thank you very much."

R.T. at 54, Evidentiary Hearing, May 9, 10, 1978.

rear of the station wagon where he was ordered to stand in the headlights of Kramer's patrol car. On request, the driver produced a Washington driver's license. The officer then approached the passenger's side and ordered the occupant to get out and also stand in the front of the headlights of his patrol car. The passenger was identified as defendant Loud Hawk. Griffiths meanwhile had followed the direction of the motor home and found it on the highway about one-half mile away from the initial stop. The motor was running, the lights were on and the door was shut. No occupants were found inside. Both vehicles were then locked, towed away and impounded by the Oregon State Police until a search warrant was obtained.

On Saturday, November 15, 1975, state search warrants were obtained for the search of both vehicles.[3] The Oregon State Police searched both vehicles on Saturday, November 15, 1975, pursuant to their warrants. No federal agent participated in the decision to obtain the state search warrant. Federal agents observed the search of both vehicles but did not participate directly except that federal agent Hancock entered the motor home on one occasion. The findings of the trial court on remand in part relate the subsequent events:

> "Firearms were found in the motor home, which was searched first, and federal agents were told of this fact.[4] Federal agents then suggested that the station wagon be searched for firearms. State officers opened the station wagon and found the dynamite immediately. Federal agents did not participate physically in the search of the station wagon, and no federal warrant had been obtained. Federal agents did observe the state search and photograph the dynamite as it appeared in the station wagon.
>
> "On November 16, the dynamite was transferred from the station wagon to a state police car by state officers. Federal agents did not participate physically but did observe and photograph the dynamite as it appeared in the trunk of the state police car. Federal agents did not advise or direct any action with respect to the removal or transportation of the dynamite. Federal agents made no request that any of the dynamite be preserved for their purposes. Had such a request been made, state police would have complied.
>
> "The decision not to keep the dynamite was made by Trooper Fettig of the state police, pursuant to an unwritten policy defined by his practice of six years before November 1975. Trooper Fettig's practice of destroying explosives was based on the lack of state storage facilities, problems with chain of custody and public safety considerations. Federal agents did not actively participate in Trooper Fettig's decision not to transport the dynamite for safekeeping. Federal agents were present and aware of Trooper Fet-

[3] Federal search warrants were obtained the following day and executed on the 16th after the Oregon State Highway officers had completed their search. R.T. 1, 9.

[4] Among the firearms found were semi-automatic rifles, police shotguns, handguns, more than 2,600 rounds of ammunition, 150 blasting caps, nine empty pineapple training hand grenades, pocket watches with the faces drilled to permit preparation of time bombs plus other bomb-making equipment such as batteries, wire, cable, etc.

tig's intended destruction of the dynamite and neither encouraged nor discouraged such action.

"The decision to destroy, like the decision not to transport the dynamite, and containers was made by Trooper Fettig, pursuant to state police policy and in his discretion. No federal agent participated in this decision. Federal agent Milam, the only federal agent present at the destruction of the dynamite and containers, rode with a state officer in a car following Trooper Fettig's to a gravel pit outside Ontario for the purpose of observing and photographing the destruction. Agent Milam neither encouraged nor discouraged the destruction of the dynamite and containers." Findings of Fact at 3.

II

A five count superseding indictment charged all of the appellees with three counts relating to possession of an unregistered and unnumbered destructive device

> "consisting of a combination of parts designed and intended for use in converting a device into a destructive device; said combination of parts consisting of: (a) six (6) pocket watches, each with a hole drilled in the face with a metal screw inserted into the hole in a position with the moving hands of the watch, with a soldered battery connector and a ground wire attached with expended flash bulbs attached; (b) four (4) batteries with wires attached; and (c) two (2) expended flash bulbs with wires attached; and said device consisting of watches, timing devices, electrical blasting cap leg wires, wires, electrical blasting cap, detonating cord, batteries, and

> seven (7) cases of DuPont 70 percent dynamite, and said destructive device had not been registered to them in the National Firearms Registration & Transfer Record as required by section 5841, Title 26, United States Code, in violation of section 5861(j) and section 5871, Title 26, United States Code." C.T. at 113, 114, 115.

Count I charged the violation as above; Count II again described the same destructive device and charged violation of the provision requiring identification by serial number as required by section 5842 (c) of Title 26, and 27 CFR 179.102 and violation of sections 5861(i) and 5871.

Count III again described the same destructive device but with violation of different registration requirements.

Count IV charged Loud Hawk with wilfully transporting weapons in interstate commerce which had their serial numbers obliterated, to wit: four Valmet semi-automatic rifles; one Colt AR-15 Cal. 223; three Smith & Wesson .357 Magnums and a Swiss-made 7.5 mm handgun, in violation of Title 18, section 922(k), United States Code.

Count V charged only Dennis James Banks, who was a fugitive when the indictment was returned.

Because the dynamite which was being transported was destroyed by Oregon State Police who had apprehended the defendants, the district court dismissed the dynamite counts with prejudice pursuant to Rule 48(b), Fed. R. Crim. P., on grounds of unlawful suppression of evidence. When the government then declined to proceed with the firearms count until it could appeal the ruling on the dynamite counts, the district judge dismissed the indictment with prejudice. The federal government then appealed the Order Dismissing the Indictment. On June 11, 1976,

the appeals of the suppression order and the order dismissing the indictment were consolidated by this court. Nos. 76-1906 and 76-2127, July 26, 1977.

A panel of this court considered the matter after oral argument and by a divided vote affirmed the judgment of the district court. Application for en banc reconsideration was made and this court en banc directed a remand to the district court for the purpose of obtaining an evidentiary hearing and to make findings of fact with respect to the following matters:

> "1. Did any agent of the federal government participate in the destruction of the evidence? The factual findings should include the nature and extent of the federal participation, if any, in:
>
> "(a) The search for, and possession of, the evidence destroyed;
>
> "(b) The decision not to transport the dynamite for safekeeping;
>
> "(c) The decision to destroy, and the actual destruction of, the dynamite and containers;
>
> "(d) Any other actions or inactions relevant to the destruction of the evidence; and
>
> "(e) Any other actions or inactions to preserve samples or secondary evidence.
>
> "2. What prejudice, if any, was suffered by the defendants as a result of the destruction of the evidence?
>
> "In this order, the term 'dynamite' is used to designate the material that was contained in the cartons and that was destroyed.

> "This court retains jurisdiction of this case and requests the district court to hold hearings and make findings pursuant to this limited remand within 45 days of the date of this Order, or as soon thereafter as practicable." Order of Remand, March 6, 1978.

The district court held an evidentiary hearing on May 9 and 10, 1978, and made findings at its conclusion. Wherever possible in this opinion, matters of fact are taken from the facts developed at that remand hearing and noted in the district court's findings.

III

Throughout the consideration of the case there continues to be uncertainty voiced by the district court and by the defendants as to the nature of the substance contained in the boxes which were destroyed. The district court in its Order Suppressing Evidence makes reference to the fact that "State Police Officers discovered what appeared to be seven cases of DuPont Gelex 2-70% dynamite." Following the evidentiary hearing on remand, the court refers to the explosive as "[t]he substance at issue *which I shall call dynamite for the purpose of these findings. . . .*" (Emphasis added).

Officer Fettig, the explosives expert of the Oregon State Police, who was dispatched to investigate the explosive problem, went to the impounded station wagon and, in his words "opened the driver's right rear door and noticed in the inner compartment of the station wagon, with the seats laid down, that in a greenish black visquine bag there was dynamite."[5]

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[5] Officer Fettig described himself as an explosives technician. He had at that time been with the Oregon State

There was no doubt or equivocation in his judgment or his statement of fact stating that "there was dynamite." Each of the seven boxes was marked "High Explosives Dangerous" and on the side had the following markings:

"50 lbs
Gelex 2 1×8
70% Strength
D73MAO 7B"

together with the logo of the DuPont company prominently displayed. Inside were red cylindrical sticks with heavy wrapping paper covering the contents and marked:

"Explosives Dangerous
Gelex 2
70% Strength
E I Dupont De Nemours & Co. (Inc.)."

Police about six years. He had been in the military service for 25 years as an explosive ordnance disposal expert. He had been an explosives disposal man in World War II overseas for three and one-half years. Back in the United States he was assigned to Aberdeen Proving Grounds. He was an instructor in explosives and explosive devices, chemical and biological warfare. From there he was sent on special assignment clearing bomb ranges that were being returned to the owners after use as practice bombing ranges. In 1950, he was reassigned as an advisor to the Secret Service on bomb disposal procedures for the protection of the President and Vice President of the United States. In 1953, he was assigned to the Far East Command as an explosive ordnance technician on Okinawa and more recently he retired from the Army and has been employed by the Oregon State Police. He testified that he had destroyed on the average between 7,500 and 9,000 pounds of dynamite every year since he has been with the Oregon State Police.

and again carrying the number D73MAO 7B, with a last letter as Q or A, or Y.

There was no testimony or other evidence to prove that it was not dynamite. Certainly it could be detonated and would explode because it did. A witness put on the stand by appellees, Ronald McCreary, qualified as an expert on the basis of using dynamite in road building, which was part of his occupation as a civil engineer. He looked at the pictures of the explosion and stated that the substance did not seem to have the explosive characteristics of the dynamite he was familiar with. Yet, he stopped short when asked the direct question whether he knew that it was dynamite or not, and acknowledged that he did not know.[6]

Photographs were taken of the explosives in the station wagon to show the cartons or boxes of Gelex 2 and the identity of the manufacturer with the serial numbers of the individual sticks so that they could be identified. They were in fact identified by employees of DuPont, manufacturer of the dynamite, by witnesses Bishop and Ursic. Bishop was a magazine keeper of explosives manufactured by the DuPont Company in the March 1973 trial period at its Washington plant. He identified a bill of lading, a cardex

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[6] Testimony of defendant witness Ronald McCreary was as follows:

"Q Now, did I understand your testimony that this appeared to be an incomplete detonation of dynamite? Is that a fair statement?

"A No, I said it was an incomplete combustion of some materials. I do not know what they are.

"Q Oh, you don't know whether it's dynamite or not?

"A Oh, no. I wasn't there.

"Q And you can't tell from the photographs?

"A No."

R.T. at 235, Evidentiary Hearing, May 9, 10, 1978.

file showing the manufacture and shipment of dynamite from the Washington plant and a pack report showing where the material was manufactured and sent to the magazine for storage. The witness testified that the documents reflected the manufacture of 46 cases of Gelex 2 dynamite in 1973. Most important, he testified that those records "list the serial numbers or identification numbers that appear on those sticks of dynamite," *i.e.*, the sticks in the 46 cases. No questions were asked on cross-examination.

Anthony Ursic was the assistant manager of that particular plant [at DuPont, Washington] in 1973. That plant, he testified, manufactured explosives, "dynamite essentially." From exhibit 17, he testified that "[t]he envelope contains paper that is used to wrap dynamite. And it's similar to the type we use at our plant." Evidentiary Hearing, R.T. at 177.

> "Q. Looking at the records you have in Government's Exhibit 17, can you tell where the dynamite which is contained in wrappers 1 through 7 was manufactured and when?
> "A. Yeah. Actually, the code date here is—for Gelax (sic) 2 is 974 MAO 7B, which is similar to the code date on here.
> "Q. And what does that—
> "A. So this indicates that 46 cases were made and shipped to a customer in Montana.
> "Q. And when they were shipped, were they full cases of dynamite?
> "A. Yes."

Evidentiary Hearing, R.T. at 180-81.

When the DuPont employees testified, they referred to the cartons, the wrappers, the substance inside the wrappers, all in terms of "Gelex" or dynamite. They

apparently had not been instructed to use a particular name—"dynamite"—as an artificial or symbolic term for an unknown substance. They referred to the substance as "dynamite" or "Gelex" as a name for a particular DuPont dynamite product.

Finally, neither the indictment nor the statute requires that the explosive be "dynamite." It is couched in broader terms and refers to a "destructive device." [7]

It does not require that the parts be put together and ready for ignition or detonation if the parts are also available from which a destructive device may be readily assembled. *United States v. Shafer*, 445 F.2d 579, 583 (7th Cir.), *cert. denied*, 404 U.S. 986, 92 S.Ct. 448, 30 L.Ed.2d 370 (1971). Under the circumstances in which it was being transported, with firearms and bomb components and ammunition, the explosive here belies any contention that the group was on a peaceful agrarian mission, or that the explosive was to be used to dislodge stumps.

IV

The appellees have pointed to nothing in the circumstances we are concerned with that establishes that the federal authorities participated with the state authorities in destroying the dynamite. From the very beginning, when the FBI sent out its all points bulletin, the federal authorities made it plain that they did not want state authorities to interfere. The state trooper did not comply. He disregarded the

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[7] 26 U.S.C. § 5845(f) reads in part as follows:

> "The term 'destructive device' means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket . . . or (F) similar device."

admonition.[8] When the vehicles were secure, they were in state possession and not federal possession. The State of Oregon obtained its own search warrant from a state official and conducted its own search of the vehicles. The state used its own fingerprint expert to examine the vehicles. It called in its own explosives expert, Officer Fettig, to determine what to do with the explosives. That expert made his own decision without calling upon the federal officers. There is no evidence of any connivance or even conference between the two groups of law enforcement officers as to the handling of the problem.

The legal principles we are to look to for a solution to the problem here are well established. When the government loses or destroys tangible evidence prior to trial, a motion to suppress secondary evidence such as photographs, testimony of witnesses, etc., will be granted by the trial court if the defendant can show (1) bad faith or connivance on the part of the government, and (2) that he was prejudiced by the loss or destruction of the evidence. *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972), *cert. denied*, 410 U.S. 916, 93 S.Ct. 972, 35 L.Ed.2d 278 (1973); *see also United States v. Young*, 535 F.2d 484, 488 (9th Cir.), *cert. denied*, 429 U.S. 999, 97 S.Ct. 525, 50 L.Ed.2d 609 (1976); *United States v. Heiden*, 508 F.2d 898, 902 (9th Cir. 1974); *United States v. Henry*, 487 F.2d 912 (9th Cir. 1973).

Thus, returning to the specific questions asked on the remand and commenting on them seriatim, the first question addressed by this court to the trial court on remand was whether any agent of the federal government participated in the destruction of the evi-

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[8] See Note 2, *supra*.

dence and the nature and extent of that federal participation. There was no finding on remand that there was any federal participation in that destruction.

(a) It was the state trooper who found the defendants in their two vehicles, stopped them on his own responsibility and took charge of the evidence on behalf of the state. At this point the only shred of argument to the contrary is that the stop and impounding of the vehicles was triggered by the teletype message put out by the FBI. But that message directed the state police not to take the persons or vehicles into custody. State Police Officer Griffiths said simply but unequivocally that he made the stop because he thought that was the thing to do despite the bulletin's direction to the contrary. He was acting as an Oregon police officer and not as an adjunct of the federal government, but contrary to its admonition.

(b) The decision not to transport the dynamite for safekeeping was made by Officer Fettig of the Oregon State Police. He testified that it was his responsibility what to do with the explosives and that he was guided solely by his own judgment based on a six-year state policy.

(c) The decision to destroy the explosives was again that of Officer Fettig. It was in accordance with the state policy of long standing and not a decision of the moment after consulting the federal authorities. There was no evidence to the contrary. No evidence or finding indicated there was even any discussion with federal authorities at the scene or elsewhere concerning the manner of disposition of the explosives. Fettig (with assistance of Griffiths, an Oregon State Trooper) transferred the explosives to Fettig's

automobile and organized the three-car convoy that took the dynamite away with one state car leading, the second with Fettig and the explosive and the last car affording protection from the rear.

(d) There was no evidence or finding as to the question of taking samples or preserving other secondary evidence. Both a state police officer and a federal officer took photographs which were made available to the court. Testimonial evidence was available from the officers who witnessed the destruction and the officers testified and were cross-examined and the photographs and dynamite wrappers were introduced.

(e) With respect to the last question addressed to the district court, it concerned "any other actions or inactions" in regard to the destruction of the dynamite. The district court here calls attention to the cross-examination of John O'Rourke, Special Agent in Charge of Oregon, who came to Ontario before the dynamite was destroyed. The testimony of several FBI agents makes it clear that their interest was in locating federal fugitives and particularly Leonard Peltier. O'Rourke was asked if he knew whether Beverly Axelrod, an attorney for the defendants, was in Ontario. He said that he did, and then the inquiry was whether he made any effort to inform her of the impending destruction of the dynamite. He replied that he had not. Likewise, Axelrod never inquired of O'Rourke to be allowed to witness the destruction.

The situation thus remains highly problematical. It is also unclear whether Axelrod was at this time and on this trip actually working for Loud Hawk. She was not produced, nor did she

testify at any of the hearings. Throughout the entire proceedings, Loud Hawk was represented by Schiffman and Jones, a law firm of Portland, Oregon. At the trial, which took place in 1976, the court inquired of Loud Hawk as it did of the others, who their attorneys were, and Loud Hawk then stated he was represented by Lawyer Jones and was satisfied with his services. Axelrod does not appear of record as an attorney at any place in the record we have been able to find. Finally, the point that is attempted to be made, that federal agents failed to have defendants' attorneys examine the dynamite before its destruction, is even less convincing when we remember that O'Rourke was never shown to have had any authority to stop or postpone the destruction of the evidence in the first place. Neither would he have any reason to look for Axelrod and invite her to witness the state's destruction of the dynamite.

The appellees rely on *Lustig v. United States*, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949), to prove that there was federal participation in the search and in the subsequent destruction. Lustig was a principal in a counterfeiting operation which appeared to be in operation in a hotel room. Greene, a Secret Service agent, was suspicious of the activity but apparently did not believe he had enough evidence for a break-in or even to obtain a warrant. He gave the information to the city police who proceeded to obtain an arrest warrant but no search warrant. The city officers entered the room illegally while Greene remained at the police headquarters awaiting their telephone call. As soon as a search warrant was obtained the police officers called Greene who then joined them in making the search. He helped the city

police in the search, selecting evidence that would help a federal prosecution and accepting other evidence the local officers gave him. The Court said:

> "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter.
>
> . . .
>
> "Though state officers preceded Greene in illegally rummaging through the bags and bureau drawers in Room 402, they concerned themselves especially with turning up evidence of violations of the federal counterfeiting laws after Greene joined them. He was an expert in counterfeiting matters and had a vital share in sifting the evidence as the search proceeded. He exercised an expert's discretion in selecting or rejecting evidence that bore on counterfeiting. The fact that state officers preceded him in breach of the rights of privacy does not negative the legal significance of this collaboration in the illegal enterprise before it had run its course. Greene himself acknowledged such participation by his remark about 'leaving the room after we had gathered all this evidence together.'" *Lustig v. United States*, 338 U.S. 74, 78-79, 69 S.Ct. 1372, 1374, 93 L.Ed. 1819.

In the case before us there was certainly not participation in the *Lustig* manner. The federal officers here did not have a part in the search of the car or in the destruction of the dynamite. Their major concern was with the whereabouts of Leonard Peltier and they hoped to find him among the travelers.

The opinions of this court in *United States v. Higginbotham*, 539 F.2d 17 (9th Cir. 1976), and *United States v. Trenary*, 473 F.2d 680 (9th Cir. 1973), are also of no assistance to appellees. In *Higginbotham*, the appellant was convicted on a Dyer Act charge. Shortly after appellant's arrest, an officer of the Boise, Idaho, Police Department put together a photographic display composed of 18 photographs, one of which was that of appellant. During pretrial proceedings, appellant's photograph was readily identified from among the pictures constituting the display. At trial the display could not be produced because it had been broken up and the pictures returned by local police to their files. Before this court, appellant complained that the failure to produce the display denied him due process. The contention was rejected, Judge Kilkenny stating:

> "Here is a proper place to emphasize that the fifteen photographs were never in the possession of the prosecutor, the FBI or any other United States Government agency. The Boise police, under these facts, cannot be said to be acting on behalf of the federal government but rather on behalf of the State of Idaho. *Cf. United States v. Smith*, 433 F.2d 1266 (CA5 1970). Under such circumstances we should be reluctant to impute to the federal government the mistakes, particularly relatively innocent ones, committed by local police. Moreover, the demand to produce these photographs might well be likened to an attempt to require production under the Jencks Act of statements in the possession of state police. *See Beavers v. United States*, 351 F.2d 507 (CA9 1965), where the statements were never in possession of the United States and production

was not required. By analogy, it is evident that the United States is in no way responsible for the actions of the Boise police in disposing of the fifteen photographs by inadvertence or otherwise." *Id.* at 21.

In *Trenary* there was a conviction for conspiracy to import marijuana from Mexico. The marijuana and duffle bags containing it had been destroyed by the Mexican police before trial. There being no charge of bad faith or negligence by the United States, secondary evidence was admissible at the trial. *Trenary* is another example of the refusal of this court to impute to the federal government the loss or destruction of evidence by other authorities over whom it has no authority or control.

V

The final questions addressed to the trial court concerned prejudice. Under the law of the circuit, even if there should be a finding of participation in the destruction, there must also be a showing by the defendants that they have been prejudiced by the loss of the evidence. *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972) and cases *supra*. Prejudice was suffered by the defendants, the trial court says, "to the extent that their inability to observe the destruction and to analyze samples of it deprived them of the opportunity to contest the government's conclusion that the substance destroyed was indeed explosive." We have already noted the weakness of the testimony of witness McCreary, who examined the photographs of the explosion and who then declined to express any opinion as to the question whether the explosion was of dynamite or not.

The last finding of the trial court was that the defendants "were also prejudiced by the destruction of the cartons and plastic bag which contained the dynamite in that they were deprived of the opportunity to determine by fingerprinting who might have handled those items."

We find the fingerprinting argument a little difficult to follow. Let us assume that X, Y and Z are being prosecuted for possession of contraband and that the fingerprints of X are found on the contraband. This evidence might be used against X, but it does not affect Y and Z, whose prints were not found. As to defendants here, lack of their fingerprints is exculpatory, if anything. Absence of fingerprints has little significance to prove or disprove handling. The handlers might have worn gloves; they might have removed their prints; or they might have employed someone else to lift the dynamite. It is only where there *are* fingerprints that such identification is helpful, and then helpful to the prosecutor, if to anyone, in establishing an identity not otherwise discovered. Here, there is no prejudice to the defendants in the destruction of the boxes and the plastic covering or any other part of the explosives as a result of possible destruction of fingerprints.

VI

In its second assignment of error, the government contends that the district court incorrectly dismissed the indictment against appellees. The district court's order dismissing the indictment was founded on Rule 48(b) of the Federal Rules of Criminal Procedure. That rule authorizes the court to dismiss an indictment whenever there has been "unnecessary delay in bringing a defendant to trial." The government ar-

gues that the delay in prosecuting appellees has not been "unnecessary," and consequently that the district court abused its discretion in dismissing the indictment. Assuming *arguendo* that the district court did not err in dismissing the indictment, the government contends that the court below did err in dismissing the indictment with prejudice. While dismissal with prejudice is authorized by Rule 48(b), the government points out that such power is to be utilized with caution and only after a forewarning to the prosecution that dismissal with prejudice will result from a failure to proceed to trial. *United States v. Simmons*, 536 F.2d 827, 834 (9th Cir. 1976), *cert. denied* 429 U.S. 854, 97 S.Ct. 148, 50 L.Ed.2d 130, *see also United States v. Charnay*, 577 F.2d 81, 84 (9th Cir. 1978). The government argues that the trial court failed both to exercise the requisite caution and to provide the required forewarning, and thus improperly dismissed the indictment with prejudice.

In examining the government's second assignment of error, the merits of its arguments are best demonstrated if the dynamite and nondynamite counts are analyzed separately.

The dynamite counts. The delay in prosecuting appellees on the dynamite counts has not been unnecessary under Rule 48(b). The government had a statutory right to appeal the suppression order as it applied to the dynamite counts. The delay has been necessary to permit the meaningful exercise of that statutory right.

The government has been granted the right by statute to appeal suppression orders entered by the district court. That right is set forth in 18 U.S.C. § 3731. Section 3731 provides in pertinent part:

> "An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing . . . evidence . . . not made after the defendant has been put in jeopardy . . . if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."

The government's right to appeal is available conditionally. First, the appeal is not available if the defendant has been put in jeopardy. Second, the appeal must not be taken for purpose of delay. Third, the evidence suppressed must be substantial proof of a fact material in the proceeding. Clearly, these conditions were met in the context of the dynamite counts. (1) Appellees have yet to be placed in jeopardy. (2) The appeal was not taken for purpose of delay. The delay in bringing appellees to trial was necessary to permit the government to effectively exercise its statutory right to appeal. (3) The suppressed evidence was critical in establishing a necessary element of the alleged offenses, the existence of an explosive device.

In summary, the government had a statutory right to appeal the suppression order if certain conditions were met. Those conditions were satisfied as to the dynamite counts. Delay was necessary to permit the government to effectively take its appeal. Clearly, such a delay, necessary to give effect to a statutory right, cannot be deemed "unnecessary" for purposes of Rule 48(b). Therefore, we hold that the district court erred in dismissing the dynamite counts pursuant to Rule 48(b); we reverse that portion of the

district court's order dismissing these counts; and remand the cause to the district court with instructions to reinstate the indictment as to these counts.

The nondynamite firearms counts. The delay in prosecuting appellees on the nondynamite counts of the indictment has been unnecessary for Rule 48(b) purposes. As previously discussed, the government's right (via section 3731) to appeal a district court's order suppressing evidence is conditional. One of the conditions is that the evidence suppressed must be substantial proof of a fact material in the proceeding. This condition must be met before appeal of the suppression order can properly be taken. Despite the government's protests to the contrary, the suppressed evidence (dynamite) is not substantial proof of any material fact in the nondynamite counts of the indictment. The trial court found as much. Given the government's failure to satisfy this condition, its appeal of the suppression order as it relates to the nondynamite counts was improper and the delay in prosecution occasioned by this appeal has been unnecessary under Rule 48(b). Therefore, we find that the court below properly dismissed these counts of the indictment.

Having determined that the trial court properly dismissed the nondynamite counts of the indictment, we turn now to the propriety of dismissing those counts with prejudice. In *United States v. Simmons, supra,* at 834, this circuit held that even though dismissal with prejudice is authorized by Rule 48(b), trial courts should utilize such power with caution and only after a forewarning to the prosecution that dismissal with prejudice will result from a failure to proceed to trial. The government argues that the requisite caution and forewarning required by *Simmons* were absent in the trial court's dismissal of the nondynamite counts with prejudice. We agree.

We find the record devoid of any forewarning to the prosecution that the nondynamite counts of the indictment would be dismissed with prejudice. The district court's entry dismissing these counts contains no reference to a forewarning of impending dismissal with prejudice. The remainder of the record is equally as barren.

Any attempts to create the requisite forewarning from a declaration made by the United States attorney at a hearing conducted several days prior to dismissal must also fail. At the hearing the government counsel observed: "[W]e will suffer a dismissal at this time if the Court should choose to do so rather than go to trial on the imperfect case that we would have to present if we were forced to trial now." 12 R.T. at 6. This statement cannot be a sufficient forewarning to satisfy the requirement of *Simmons.* First, the statement was made by the government, not the trial court. It is the trial court that is required to forewarn the prosecutor, not vice versa. Second, and far more important, the government's statement indicates that it was prepared to suffer dismissal. Nothing is said concerning its preparedness to suffer dismissal with prejudice. As indicated in *Simmons,* at 837, it is not enough to forewarn that dismissal may result from a failure to proceed to trial. Rather, the prosecution must be forewarned that the dismissal will be with prejudice.

Given the failure of the trial court to provide the forewarning mandated by *Simmons,* we reverse that portion of the trial court's order dismissing the nondynamite counts with prejudice and remand the cause to the district court for further consideration of its dismissal of these counts in light of this opinion.

In conclusion, we reverse the orders of the district court granting appellees' motions to suppress and to dismiss the indictment with prejudice. Further, we remand the cause to the district court with instructions: (1) to deny appellees' motion to suppress, (2) to reinstate the indictment as to the dynamite counts, and (3) to reconsider its dismissal of the nondynamite counts with prejudice in light of this opinion.

SO ORDERED.

KENNEDY, Circuit Judge, files a separate concurring opinion in which BROWNING, EUGENE A. WRIGHT, CHOY, WALLACE, and J. BLAINE ANDERSON, Circuit Judges, concur.

KENNEDY, Circuit Judge, concurring:

This case presents the opportunity to state certain controlling rules where evidence has been lost or destroyed in a criminal case. Some of our earlier cases, where the proper outcome was perhaps clearer than in the present instance, did not provide extensive analysis of the interests at stake or of the reasons behind the adoption of a particular approach. Loss or destruction of evidence probative in a criminal case occurs in circumstances so variant that we cannot set forth here the applicable rules for every case but certain principles of broad application may be stated with assurance and serve to resolve this appeal.

When criminal evidence is lost or destroyed, the court must protect a complex of interests, some conflicting. Our principal concern is to provide the accused an opportunity to produce and examine all relevant evidence, to insure a fair trial. Absent special circumstances, we do not reverse convictions or dismiss criminal charges based on events that do not cause harm to the accused; and so the degree of prej-

udice from loss or destruction of the evidence should be weighed. Other considerations which bear upon the right to a fair trial are also present if intentional or culpable government action has caused the loss or destruction. The significant interest in such cases is to avoid the impairment of judicial integrity that would occur if the prosecution were allowed to manipulate court processes, and protective rulings or sanctions may be required both to insure a fair trial in a specific case and to deter future violations. The degree of government fault is relevant, for if suppression of secondary evidence or other protective rulings and sanctions were automatic in every case in which the Government is responsible for the loss of the evidence, then we would not give proper recognition to the responsibility of the Government to prosecute criminal cases. This right should not be forfeited in every instance where a government official has erred. In a rare case, government action may be so culpable that deterrence of future violations and protection of judicial integrity become the principal concern, and then only a plausible suggestion of prejudice or none at all would be required for suppression of evidence or the imposition of other sanctions, such as dismissal of the charges. In the more frequent case, the Government's responsibility for loss of the evidence is caused by actions that are, alternatively, negligent in some degree, or inadvertent, or done intentionally but with an element of good faith, and in these instances a somewhat greater degree of prejudice may be tolerated. In cases of severe prejudice, suppression or other sanctions would be appropriate without regard to the good faith or culpability of the Government. However, in other cases, proper reconciliation of these competing interests requires us to

resort to the familiar judicial process of balancing the factors in a given case.

The proper balance is that between the quality of the Government's conduct and the degree of prejudice to the accused. The Government bears the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice. *See United States v. Mays*, 549 F.2d 670, 677, 678 (9th Cir. 1977). In weighing the conduct of the Government, the court should inquire whether the evidence was lost or destroyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification. Federal courts have greater authority and control over the actions of federal officers than over the officers of a state, and the nature and degree of federal participation is relevant although not dispositive. It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to loss or destruction of the evidence, for prosecutorial action may bear upon existence of a motive to harm the accused.

Against all this must be weighed the degree of prejudice to the defendant. In analyzing prejudice, the court must consider a wide number of factors including, without limitation, the centrality of the evidence to the case and its importance in establishing the elements of the crime or the motive or intent of the defendant; the probative value and reliability of the secondary or substitute evidence; the nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to

the accused; the probable effect on the jury from absence of the evidence, including dangers of unfounded speculation and bias that might result to the defendant if adequate presentation of the case requires explanation about the missing evidence.

We adopted a flexible approach, consistent with the balancing test proposed here, in *United States v. Higginbotham*, 539 F.2d 17 (9th Cir. 1976) (alternate holding).[1] In that opinion the court stated that in destruction of evidence cases, "the following factors should be considered: (1) the degree of negligence or bad faith involved, (2) the importance of the lost evidence, and (3) the sufficiency of the other evidence adduced at the trial to sustain the conviction."[2] *Id.* at 21. The proposed test is also quite

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[1] The balance test of *Higginbotham* is helpful, but the same cannot be said for the discussion in that case of federal participation. We cannot accept the implication that the destruction of evidence by state officers acting alone, no matter how egregious their conduct or how important the evidence destroyed, could never be sufficient for a federal court to invoke a protective rule to guard the rights of the defendant or the integrity of the judicial process. In *Higginbotham* itself, the particular evidence was of minimal importance and the conduct of the state police was at worst careless.

[2] It appears that a type of balancing was used in this circuit, even before *Higginbotham*. In *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972), *cert. denied*, 410 U.S. 916, 93 S.Ct. 972, 35 L.Ed.2d 278 (1973), the defendant had been subjected to a blood alcohol test. After the test was performed the sample was destroyed by a technician who thought the sample was no longer necessary. The court stated that "[n]ot every blunder by investigators should result in the exclusion of relevant competent, important evidence," 468 F.2d at 237, and concluding that in the circumstances, using the remaining secondary evidence would not be "so unfair as to require its exclusion," *id.* at 238.

similar to the test which the First Circuit has adopted. In *United States v. Picariello*, 568 F.2d 222 (1st Cir. 1978) the court articulated what it called a three-pronged examination which considered "first, was the evidence material to the question of guilt or the degree of punishment; second, was defendant prejudiced by its destruction; and third, was the government acting in good faith when it destroyed the evidence." *Id.* at 227. The appropriate test as set forth here is more detailed than in *Higginbotham* or *Picariello* with the purpose to provide more guidance when this question arises in later cases.[3]

In an analogous area, that of prearrest delay, this circuit has adopted a balancing test similar to the one proposed here. *United States v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977). Where the police delay in arresting a defendant or in otherwise notifying him that he is under investigation, he may later contend he had no notice to preserve evidence such as records, and that testimony of witnesses or his own recollection of the day in question may be blurred by the passage of time. These cases present concerns which closely parallel those in destruction of evidence cases, including fairness to the defendant, the discouraging of police or prosecutorial misconduct, preserving the

[3] We think this test is consistent with the result in *United States v. Heiden*, 508 F.2d 898 (9th Cir. 1974). *Heiden* states that where evidence has been lost or destroyed the conviction will be reversed if the defendant can show "(1) bad faith or connivance on the part of the Government, or (2) that he was prejudiced by the loss of the evidence." As the discussion in *Heiden* demonstrates, "prejudice" as used there means serious impairment of the accused's ability to present his defense. In cases of severe prejudice the *Heiden* formulation would lead to the same result as under the test set forth in this case.

integrity of the judicial system, and protecting society's interest in the prosecution of criminal violations. In *United States v. Mays, supra*, this court rejected the two absolute approaches suggested by the parties: that prejudice alone is sufficient or that both prejudice and improper intentional delay must be shown. It adopted instead a test which balances all the circumstances, including the prejudice to the defendant and the reason for the police delay. Such a balancing test seems equally appropriate for the case at hand.[4]

The test proposed here is not of constitutional dimensions. The Supreme Court in *United States v. Augenblick*, 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969) has stated that destruction of evidence becomes a problem of constitutional dimensions only in the most extreme case:

> The Court of Claims, in a conscientious effort to undo an injustice, elevated to a constitutional

[4] A similar problem to the one faced here arises when the Government intentionally deports potential witnesses before the defendant has had an opportunity to interview them. *See United States v. Mendez-Rodriquez*, 450 F.2d 1 (9th Cir. 1971). This circuit has held that despite good faith on the part of the Government, the defendant need not show that the testimony of the lost witnesses would have been favorable, although he must demonstrate at least some possibility that the testimony could have been of benefit. *See United States v. Orozco-Rico*, 589 F.2d 433 (9th Cir. 1978); *United States v. McQuillan*, 507 F.2d 30, 33 (9th Cir. 1974). In these cases, even a small possibility of prejudice is sufficient despite good faith government conduct. We do not believe, however, that a similar approach is required in destruction of evidence cases. Deportation of witnesses involves the fundamental and specifically guaranteed right of compulsory process for obtaining witnesses provided by the sixth amendment. The sixth amendment is in no way implicated in the case at hand.

> level what it deemed to be an infraction of the Jencks Act and made a denial of discovery which "seriously impeded his right to a fair trial" a violation "of the Due Process Clause of the Constitution." . . . But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest.

Id. at 356, 89 S.Ct. at 534. Rarely will the unfairness that might be caused by the destruction of evidence rise to the level of making the proceedings "a spectacle or trial by ordeal." The rule advanced here is simply a judicially-created rule designed to prevent police misconduct and permit as fair a trial as possible.

Turning to the facts of this case, we examine first the reasonableness of the Government's conduct. The starting point is the findings of the district court. In its initial decision, the court found as follows: The police did not act in bad faith in destroying the evidence. Dynamite is a dangerous substance that should only be handled and stored by experts. The Oregon State Police did not have adequate facilities in which to store this dynamite. There was a commercial magazine located about 60 miles away, however, and the dynamite could have been transported there with relative safety. In its supplemental findings on remand, the district court found that the decision not to keep the dynamite was made by officer Fettig of the state police pursuant to an unwritten policy. The practice of destroying explosives was based on the lack of state storage facilities, problems

with chain of custody, and public safety considerations. The record indicates that Fettig's principal responsibility for the state police was as a bomb and explosives expert, for which he was highly qualified. He effected frequent and routine destruction of explosives, although it appears that in almost all such cases the explosives were not relevant to any pending criminal investigation. It is unclear the extent to which the supplemental finding that the decision not to transport was based on "public safety considerations" negates the prior finding that the dynamite could have been transported with "relative safety;" but, there were at least some safety considerations which militated against transporting the dynamite. It should be noted that in addition to destroying the dynamite itself, the police also destroyed the containers in which the dynamite was stored when found. This was apparently done because, as the defendants' expert witness explained, when dynamite is improperly stored, nitroglycerin from the dynamite sticks sometimes seeps into the container, making the container itself highly explosive. Moreover, officer Fettig testified that the reason fingerprints were not taken was that the cartons were wet, and it was unlikely identifiable fingerprints could have been detected.

It is clear that accepted standards of police conduct require that a sample should be obtained whenever it is possible and safe to do so, and we think the enforcement officials, state and federal, erred in not considering the possibility of taking a sample before destroying all the evidence. However, in view of the exigencies of the situation and the police policy of destroying all explosives, this error in judgment ought not be weighed too heavily against the Government.

In this case, the error is neither intensified nor diminished by the actions of federal agents. The dynamite was discovered during a search of the vehicles pursuant to a state search warrant while the vehicles were in the custody of the state police. The district court found that the decision to destroy the evidence was made by officer Fettig, pursuant to state police policy and in his discretion. No federal agent participated in this decision. The one federal agent who was present at the destruction of the dynamite and containers neither encouraged nor discouraged the destruction. The court also found, however, that if the federal agent had requested that a sample be preserved, the state police would have complied. The federal agent was not responsible for the decision, but neither can he be given full exoneration from it. The practical necessity for a federal officer to maintain a good relationship with state police does tend to excuse the federal agent's determination in this delicate situation to allow the state to proceed to render the area safe without requesting an evidentiary sample. It is our conclusion that the actions of both the state police in destroying all the evidence and the federal agent in not preventing that destruction can be excused substantially, although it cannot be recommended as the standard for future cases.

We next consider the prejudice to the defendant. The most important part of our analysis of the degree of prejudice in this case is an evaluation of the reliability or trustworthiness of the remaining secondary evidence. The evidence includes, among other things, photographs and eyewitness descriptions of the boxes which were found in the impounded vehicle and the red cylindrical sticks contained in the

boxes. Each of the seven boxes was marked "High Explosives Dangerous" and on the side had the following markings:

"50 lbs
Gelex 2 1 × 8
70% Strength
D73MAO 7B"

together with the logo of the DuPont company prominently displayed. Inside were red cylindrical sticks with heavy wrapping paper covering the contents and marked:

"Explosives Dangerous
Gelex 2
70% Strength
E I DuPont De Nemours & Co. (Inc.)."

and again carrying the number D73MAO 7B, with a last letter as Q or A, or Y. A representative from The DuPont Co. was shown seven wrappers that had been saved by the police before destroying the dynamite. He identified the wrappers as having come from a DuPont plant in Washington. By consulting other records, he was able to determine that the code numbers on the wrappers were the same as the numbers on dynamite shipped to a customer in Montana. He confirmed that the shipment to Montana was of full cases of dynamite, not just wrappers. In addition, a chemical analysis of the wrappers indicated the presence of six of the seven ingredients necessary to make dynamite.

We consider this secondary evidence to be probative and reliable. The evidence also includes photographs taken by the police when several of the sticks were detonated with blasting caps. The defendants did produce an expert who on direct examination testified that in his opinion the photo-

graphs did not show dynamite exploding and that the pictures were completely consistent with an explosion of only the blasting caps themselves. The district court found that this testimony "cast substantial doubt on the assertion that the photographs showed the detonation of dynamite." Worded this way, the finding seems to suggest that the testimony of the expert raised substantial doubt as to whether the substance seized was dynamite. To the extent that the finding implies this, it must be deemed erroneous. On cross-examination the expert explained that the photographs could also show an incomplete detonation of dynamite. The testimony of this expert simply demonstrates that the photographs of the detonation are not completely reliable. A determination that the photographs are inconclusive evidence is far different from a determination that there is substantial doubt whether the substance seized was dynamite. The testimony of the expert supports only the former proposition, not the latter. In ascertaining the degree of prejudice, it is necessary to evaluate all the secondary evidence, not just one piece of it.

The trial court found further prejudice to the defendants because they lost an opportunity to show whose fingerprints were on the boxes. This too was error. There is no question that the boxes were in the defendant's station wagon. And even if the prints of third persons, and not the defendants', were discovered on the boxes such evidence would not be exculpatory of necessity. Moreover, the testimony was that fingerprints were not likely to be discovered on the wet boxes in any event.

All must concede that the secondary evidence is less reliable than chemical tests of the substance itself and that, as the explosive quality or no of the substance is an essential element of the offense, the loss

of the evidence does bear upon an issue that lies at the core of the case. In view, however, of the convincing and probative value of the secondary evidence as presented in the record at this point, it cannot be said that the defendants have met their burden of showing prejudice in any significant degree. The defendants have not made any offer of proof from which the trier of fact might infer the substance was other than dynamite, and in this posture of the case the secondary evidence is a satisfactory substitute for a physical sample. If at trial the defendants can make a plausible argument that the substance was something other than from what all appearances it must have been, the trier of fact can weigh the credibility of such arguments against any perceived defects in the Government's proof by secondary means. The prejudice in this case is slight or nonexistent, and the Government's conduct, while consisting in part of some errors in judgment, was on the whole reasonable and taken in good faith.

The dissent complains that, having remanded the case, we now accord no deference to the district court's findings. All of the subsidiary findings in the record developed with care by the district judge have put the case in the proper perspective. Perhaps the remand should have stopped short of asking the trial court to draw the ultimate conclusion as to whether or not there is prejudice, absent a statement of its definition and the factors that are to be considered in making that determination. Having now stated at some length the applicable rules for this case, we reach the conclusion that secondary evidence offered by the Government should not be suppressed.

The appropriate order now is to reverse the trial court's ruling suppressing the secondary evidence and to remand the case for further proceedings.

GOODWIN, Circuit Judge, specially concurring.

I concur generally in Judge Trask's opinion. The district court judgment must be reversed on both points. The dismissal with prejudice was unwarranted, and the "finding" that a federal officer participated in a significant degree in the destruction of the contents of the boxes taken from the station wagon is clearly erroneous. The evidence was that the agent of the Federal Bureau of Investigation was an observer and nothing more. Accordingly, the discussion of the consequences of federal participation is obiter.

HUFSTEDLER, Circuit Judge, dissenting, with whom ELY and HUG, Circuit Judges, concur:

I regret that I cannot concur with the majority of my brothers either in reversing the district court's suppression order or in reversing the dismissal of the indictment upon the Government's refusal to proceed to trial after its motions for continuances were denied.

I

The suppression order issue is very narrow: Are the district court's specific findings of prejudice from the destruction of evidence clearly erroneous? The simple answer is "no." In seeking to avoid this result, the majority has devised a hypothetical scale on which it weighs non-competing interests against one another, discovers that prejudice is not prejudice, and thereby announces a result in favor of the Government. I am unable to find any support for the majority's rationale either in prior case law or, if we were writing on a clean slate, in logic.

Three counts of the indictment were based on possession of a "destructive device." The material de-

stroyed included the very substance that the Government charged was the "destructive device."[1] None of the material was saved to permit independent testing of the substance.[2] The district court found that the destruction of the substance was prejudicial to the defendants because it prevented them from examining the primary evidence. The majority opinion concedes that the defendants did suffer prejudice from the destruction of the primary evidence, and it observes that "the secondary evidence is less reliable than chemical tests of the substance itself and that, as the explosive quality or no of the substance is an essential element of the offense, the loss of the evidence does bear upon an issue that lies at the core of the case." In short, the district court's finding of prejudice on this point is fully supported by the record. Under *United States v. Heiden* (9th Cir. 1974) (508 F.2d 898, which the majority acknowledges is undiminished as authority in this Circuit (Kennedy, J., Op'n at 1153 n.3), all appellate inquiry should end with "affirmed."

That result is unsatisfactory to the majority, and therefore, it is required to explain why the fact of prejudice is nevertheless not prejudice justifying

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[1] Thus, this case is unlike those in which corroborating, impeaching, or collateral evidence was destroyed. (*E.g., United States v. Harris* (9th Cir. 1976) 543 F.2d 1247 (FBI agent's rough notes destroyed; violation of Jencks Act); *United States v. Carrasco* (9th Cir. 1976) 537 F.2d 372 (informer's diary destroyed).)

[2] This facet distinguishes *Loud Hawk* from those cases where a sufficient sample was retained. (*E.g., United States v. Young* (9th Cir. 1976) 535 F.2d 484 (bulk of drug seizure destroyed but samples retained); *United States v. Heiden, supra*, 508 F.2d 898 (semble).

suppression. The majority opinion tells us that the prejudice is inadequate because the defendants did not make "any offer of proof from which the trier of fact might infer the substance was other than dynamite, and in this posture of the case the secondary evidence is a satisfactory substitute for a physical sample." As I translate this elliptical statement, the majority says that the defendants had the burden of proving that the substance destroyed was not dynamite, and if they failed to carry that burden, they could not claim prejudice from the destruction of the evidence. The reasoning is upside down. The defendants made a *prima facie* showing of prejudice and it is the Government's burden to show that the loss of the primary evidence was harmless. The destruction of the evidence, for which the Government is responsible, is the very act that makes identification of the substance impossible and thus creates the prejudice to the defendants. Thus, the majority opinion has inexplicably required the defendants to come up with proof that the Government itself has destroyed.

The majority opinion suggests that the defendants can nevertheless carry this impossible burden. "[S]econdary evidence is a satisfactory substitute for a physical sample" because it can be weighed against whatever defense argument can be made "that the substance was something other than from what all appearances it must have been." I do not know how to weigh this smoke, and I do not understand how either the defendants or the district court could have been expected to do so.

The district court found that "[d]efendants were also prejudiced by the destruction of the cartons and plastic bag which contained the dynamite in that

they were deprived of the opportunity to determine by fingerprinting who might have handled these items." (Findings of Fact at 5). The majority says that this finding is clearly erroneous because the fingerprint evidence "would not be exculpatory of necessity." (Kennedy, J., Op'n at 1155.) I am unable to follow the majority's reasoning. The presence or absence of fingerprints on the cartons would have been relevant to the issues. The destruction of the evidence prevented the defendants from being able to prove the absence of their fingerprints. The destruction also foreclosed the possibility of proving that persons other than the defendants handled the cartons and bags. The fact that fingerprint evidence would not "necessarily" have been exculpatory is irrelevant. The fact is inescapable that relevant evidence was destroyed, and the very act of destruction prevents anyone from determining how helpful that evidence might have been to the defendants.[3]

Prejudice stems from the fact that the Government prevented defendants from finding out for themselves. (*United States v. Tsutagawa* (9th Cir. 1974) 500 F.2d 420, 423 ("The thrust of *Mendez-Rodriguez* is to prevent the basic unfairness of allowing the government to determine which witnesses will not help either side and then to release those witnesses, for all practical purposes, beyond the reach of the

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[3] The Oregon State Police and the FBI attempted to take fingerprints from both vehicles and many of the objects within them. However, they did not attempt to discover fingerprints on either the plastic bags or the cardboard boxes, and the destruction therefore prevented those defendants not traveling in the station wagon from rebutting the dynamite counts with evidence that their fingerprints were not on the dynamite containers.

defendant. The vice lies in the unfettered ability of the government to make the decision unilaterally." (citation omitted)); *United States v. Mendez-Rodriguez* (9th Cir. 1971) 450 F.2d 1; *United States v. Bryant* (1971) 142 U.S. App.D.C. 132, 138, 439 F.2d 642, 648 ("Where *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal." *Cf. Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.)

As we held in *Heiden, supra*, we will reverse a conviction when there has been a loss or destruction of evidence if the defendant can show "(1) bad faith or connivance on the part of the Government or (2) that he was prejudiced by the loss of the evidence." (508 F.2d at 902.) *A fortiori*, in reviewing an order to suppress, rather than a conviction, a showing of prejudice to the defendant from the destruction of evidence will sustain a suppression order, regardless of the purity of the governmental motives in destroying the evidence.

The majority opinion correctly recognizes that we are pursuing separate and distinctive interests in situations of this kind: deterring governmental misconduct, protecting a defendant's right to a fair trial, and preserving the integrity of the judicial process. None of these interests is appropriately protected by balancing one of these interests against the other. Each of these interests is independently important, and none of them can be weighed against the others. Thus, for example, we have no interest whatever in

injuring a defendant's right to a fair trial to reward government innocence in destroying evidence.[4]

The district court, on remand, particularly decided the facts implicating the Government's involvement in the investigation and apprehension of the defendants as well as governmental participation in the destruction of evidence. It specifically found that the Government acted in good faith, and it also found that the defendants were prejudiced by the destruction of the evidence. All of those findings are fully supported by the record, and we cannot reach a contrary conclusion unless we forthrightly admit that we are substituting our judgment for the judgment of the district court on these factual questions.[5]

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[4] I am unable to find support for the majority's balancing formulation from any of the cases cited from our Circuit or elsewhere. (*United States v. Higginbotham* (9th Cir. 1976) 539 F.2d 17 (negligent loss of photographs by state officers, in which federal officers played no part, did not deny due process); *United States v. Mays* (9th Cir. 1977) 549 F.2d 670 (insufficient showing of prejudice justifying dismissal of indictment for pretrial delay); *United States v. Picariello* (1st Cir. 1978) 568 F.2d 222 (citing *Heiden* in listing factors to consider without weighing any of them).)

[5] Brother Trask, in his separate opinion, argues that the federal Government was not sufficiently implicated in the destruction of evidence to warrant suppression. Both the facts as found by the district court specifically and the underlying record reveal that the investigation was a cooperative venture between federal and state law enforcement agencies from the start. To be sure, the search was physically conducted by state officers, and state officers undertook the physical destruction of the evidence. The FBI agents, who had advance notice of the destruction, were not simply bystanders during the event. The FBI's hands were displayed prominently throughout the transactions from the search through the destruction of the evidence, thus invoking the principles

II

The district court correctly dismissed with prejudice both the dynamite and firearms counts. I agree with the majority opinion that delay in prosecuting the defendants on the dynamite counts was not unnecessary under Rule 48(b), because the Government had a statutory right to appeal the suppression order as it applied to the dynamite counts. However, dismissal of the dynamite counts was appropriate on other grounds. Suppression of the secondary evidence was tantamount to a dismissal of the dynamite counts because, without that evidence, proof of the existence of the charged offense was lacking. Thus, outright dismissal of those counts would also have been appropriate. (*Cf. United States v. Roviaro* (1957) 353 U.S. 53, 77 S.Ct. 23, 1 L.Ed.2d 39 (trial court should have entered dismissal when Government suppressed information that was important to certain counts); *United States v. Reynolds* (1953) 345 U.S. 1, 12, 73 S.Ct. 528, 97 L.Ed. 727.)

As the majority recognizes, the non-dynamite firearms counts were properly dismissed because delay in prosecution had been unnecessary under Rule 48(b). The majority nevertheless reverses the district court's order on the ground that the Government had not been adequately warned that the dismissal would be with prejudice. The record shows that the prosecution had ample forewarning, and it made its own choice not to go forward on the non-dynamite counts.

The Government deliberately decided to submit to dismissal of the firearms counts, rather than to go to

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of *Lutig v. United States* (1949) 338 U.S. 74, 78, 69 S.Ct. 1372, 93 L.Ed. 1819; *Byars v. United States* (1927) 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520; *United States v. Bryant* (1971); 142 U.S.App.D.C. 132, 141, 439 F.2d 642, 651.

trial, because it erroneously believed that it had a right to appeal the suppression order as it related to the non-dynamite counts. The suppression order was entered on March 3, 1976. On April 19, 1976, the Government filed a notice of appeal and a motion requesting a continuance of the trial date, May 12, 1976. The district court denied the Government's motion for a continuance on April 20, 1976. On April 23, 1976, the Government informed the court that it would refuse to go to trial on May 12. On April 26, 1976, we denied the Government's motion for a continuance of the trial date. The Government then told the district court that it would suffer a dismissal, rather than go to trial, because it believed it would win the appeal. A government attorney told the court: "we will take our chances on getting this Court reversed by the Ninth Circuit with respect to that evidence and . . . will suffer a dismissal at this time if the Court should choose to do so rather than go to trial on the imperfect case that we would have to present if we were forced to trial now." (12 R.T. at 6 (April 26, 1976).) More than two weeks later, on the scheduled trial date, the case was called for trial and the Government refused to proceed. The district court then entered a dismissal with prejudice.

The crucial issue is whether the Government knew, or should have known, the consequences of its refusal to proceed to trial on the scheduled trial date. The record unmistakably establishes the prosecutor's knowledge that dismissal with prejudice was one of the consequences of a Rule 48(b) dismissal. (*United States v. Simmons* (9th Cir. 1976) 536 F.2d 827.) The prosecutor told the district court: "We believe the court lacks jurisdiction to dismiss this indictment with or without prejudice in view of the Govern-

ment's good faith intent [to appeal]." The majority opinion's conclusion that a dismissal with prejudice is an abuse of the district court's discretion under the circumstances is in conflict with our decision in *United States v. Charnay* (9th Cir. 1978) 577 F.2d 81.[6]

Nothing in *United States v. Simmons, supra,* supports the majority's view that a dismissal cannot be made with prejudice unless the district court gives the prosecutor formal on-the-record warning that a Rule 48(b) dismissal includes a dismissal with prejudice. On the contrary, *Simmons* itself indicates that the forewarning can come from sources other than the district court. Such sources include the district's speedy trial plan (536 F.2d at 837) or federal legislation (536 F.2d at 836 ("the [Speedy Trial] Act clearly forewarns the United States Attorney that he must comply with the applicable time limits or face the possibility that the indictment or information will be dismissed with prejudice.")).

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[6] In *Charnay,* we held that the district court did not abuse its discretion in dismissing with prejudice an indictment under Rule 48(b). The first continuance was requested by the Government to try to locate a missing witness. The court had told government counsel that if the witness was not located at the time the case was scheduled for trial, the indictment would be dismissed. Nothing was said about a dismissal with prejudice. On the date set for trial, the witness still had not been located and the Government renewed its request for a continuance to locate the witness. The court denied the motion and dismissed the indictment with prejudice. In upholding the district court, we said: "In these circumstances the court exercised all the requisite caution, and it was entirely proper for it to dismiss the indictment pursuant to Rule 48(b). Indeed, on this record, we doubt that any other prudent course was open to the trial judge." (577 F.2d at 84.)

The prosecutor knew that if he did not proceed to trial on the scheduled trial date, the case would be dismissed and that the district court had authority to dismiss it with prejudice. The prosecution's choice was both knowing and intelligent. To be sure, the strategy misfired because government counsel labored under a misapprehension of law relating to the right to appeal the suppression order affecting the non-dynamite counts. These events provide no legal foundation for relieving the Government of the consequences of the Government's exercise of prosecutorial discretion.

I would affirm.

ELY, Circuit Judge (dissenting):

I respectfully dissent.

While I thoroughly share all of the views of my Sister Hufstedler, my conscience impels that I set forth a few comments of my own. I do this reluctantly, even sorrowfully.

When our full court originally reviewed this appeal, all the judges then involved applied their dedicated efforts to the end that the difficult issues be correctly and justly resolved. The majority concluded that the district judge had not made critical findings, and had not reached critical conclusions, with required specificity. I disagreed, believing that the facts then before us proved, indubitably, that the challenged incriminatory evidence should have been suppressed. I repeat a portion of that which I wrote in dissenting from the majority's original unpublished *en banc* decision that the cause should be remanded:

> As I see it, the fact of the Government's active participation [in the destruction of critical evi-

dence] is beyond doubt. I say this for the following reasons:

> 1. The original apprehension of the vehicles was made by Oregon police upon notification by federal agents, pursuant to a federal warrant.
>
> 2. Federal agents attended the search for, and the removal of, the dynamite from one of the vehicles.
>
> 3. The instruction to destroy the material was issued by a state officer, one McCollum, and McCollum was not produced as a witness at the suppression hearing. From this the district judge could fairly draw the inference that McCollum had received this directions from federal officers.
>
> 4. At least one federal authority was present when the alleged explosive was destroyed, and there was no evidence whatsoever that he gave instructions, or made any rquest, that any samples be retained for analysis by the accuseds.

The last point, above enumerated, is of particular significance because of the defense contention that the substance had been extensively exposed to moisture and could not be detonated without the utilization of additional explosive material. We do not know whether such was necessary or utilized, and this failure of proof most certainly cannot be attributed to the appellees. In the circumstances therefore, I submit that the critical finding of active federal participation, uncontested, was supported by substantial evidence and, in fact, could not properly have been other-

> wise. I should add that warrants were executed by federal officers and that no state charges were instituted.

In any event, the majority's original decision to remand the cause so as to allow the district judge to engage in a more intricate exploration and issue the required determinations indicates to me that the majority then felt that, from the evidence relating to the issue of suppression, the ultimate conclusions could be either in favor of the appellants or in favor of the prosecution.

The district judge, after further review, supplied us with the guidance the majority originally thought to be desired. Now before us is a finding of fact which reads:

> Federal agents were present and aware of [Oregon State] Trooper Fettig's intended destruction of the dynamite and neither encouraged nor discouraged such action.
>
> Another critical finding is as follows: John O'Rourke, Special Agent in Charge of Oregon, was in Ontario before 'the dynamite was destroyed. He new [*sic*] that Beverly Axelrod, counsel for defendants was also in Ontario before the destruction of the dynamite. O'Rourke made no effort to inform Axelrod of the impending destruction of the dynamite, of which he was aware. Axelrod never asked O'Rourke to be allowed to witness the destruction of the dynamite. No representative of defendants witnessed the destruction.

And, of what ought to be of paramount significance, we now have the district judge's critical legal conclusion that:

Defendants were prejudiced to the extent that their inability to observe the destruction of the dynamite or to analyze samples of it deprived them of the opportunity to contest the government's conclusion that the substance destroyed was indeed explosive. Defendants' only argument on this point is now limited to analysis of the photographs of the destruction of the dynamite. The testimony of witness McCreary concerning the photographs of the destruction of the dynamite cast substantial doubt on the assertion that the photographs showed the detonation of dynamite. The fact that defendants were denied the opportunity to witness the destruction or to examine samples of the dynamite therefore appears to have prejudiced defendants substantially on the issue of the nature of the substance destroyed.

> Defendants were also prejudiced by the destruction of the cartons and plastic bag which contained the dynamite in that they were deprived of the opportunity to determine by fingerprinting who might have handled these items.

And now, what happens? Not only does the majority disregard the critical determinations of the district judge, but also it holds that the judge was clearly wrong in making a determination based upon conflicting testimony. In sum, the majority now does no more in affirming the convictions that it might have done upon the record before us in the original *en banc* proceedings. In fact it does less, for it accords absolutely no weight or deference to the careful review of the district judge upon remand and the guidance with which the district judge has now

favored us, and which, in the first *en banc* disposition, the majority wrote that it wanted. I do not asperse the good faith or the motives of any of my colleagues. All of them know that I hold each in the highest esteem. Notwithstanding, I record my belief that the proceedings in this appeal, with two hearings before the full court, and all the deliberations that followed, reflect a futile exercise.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 76-1906
76-2127

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS, who gives her true name as Kamook Banks; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, DEFENDANT-APPELLEES

Appeal from the United States District Court
for the District of Oregon

[Filed July 26, 1977]

Before: ELY, HUFSTEDLER, and TRASK, Circuit Judges

OPINION

HUFSTEDLER, Circuit Judge:

The Government appeals from orders suppressing evidence and dismissing with prejudice an indictment

against the appellees.[1] The district court suppressed secondary evidence because the Government participated in the deliberate destruction of primary evidence which, under the circumstances, deprived the appellees of due process of law. The district court dismissed the indictment because the Government refused to proceed to trial after the Government's motion to continue was denied.

The backdrop of this case is the battle of Wounded Knee and the heritage of violence and death that followed in its wake.[2] Banks and Peltier were active in the American Indian Movement, and both were fugitives when the events occurred from which this indictment stems. In early November 1975, an informant told the FBI about the fugitives' whereabouts and their travel plans. On November 13, 1975, the FBI's Portland office sent a teletype to all Oregon law enforcement officers stating that federal fugitives might be traveling through Oregon in a described motor home and a station wagon, the license numbers of which were given. The teletype also requested that, if sighted, the vehicles should not be stopped, but the FBI should be notified. On November 14, 1975, at 10 p.m., Oregon State trooper Griffiths saw the vehicles. He confirmed by radio that the license numbers

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[1] Defendant Anna Mae Aquash was killed while the case was pending below. Defendant Leonard Peltier was first a fugitive and then a prisoner in Canada resisting extradition during the time of the proceedings below. Thus, this appeal involves only defendants Loud Hawk, Redner, Nichols, and Banks.

[2] *See, e.g.*, United States v. Banks (D.S.D. 1973) 368 F. Supp. 1245; United States v. Banks, (D.S.D. 1974) 374 F. Supp. 321; United States v. Banks (D.S.D. 1974) 383 F. Supp. 389, *appeal dismissed,* (8th Cir. 1975) 513 F.2d 1329.

matched the teletype, asked for help, and stopped the motor home. When Griffitns pulled over the motor home, the station wagon stopped about 100 yards behind the trooper's car. Griffiths ordered the occupants of the motor home to step out, and, in response, an Indian man, two Indian women, and a small child emerged. In answer to Griffiths' inquiry, the Indians said that no one else was inside. Thereupon, the motor home sped forward, and the Indian male who was outside the vehicle ran toward a fence and fired a shot at Griffiths.

Meanwhile, the two occupants of the station wagon, Loud Hawk and Redner, were arrested by the backup officer, who had earlier arrived. The motor home was later found abandoned about one half mile from the site of the initial stop. Both vehicles were towed away and impounded in a commercial garage in Ontario, Oregon.

On the next day, November 15, 1975, state search warrants were obtained for the search of the two vehicles, and a search of the station wagon was begun. FBI agents were present during the search. Shortly after the start of the search, they discovered what appeared to be seven, fifty-pound cases of commercial dynamite. At this point the search was terminated pending the arrival of an Oregon State Police ("OSP") explosives expert. That evening Trooper Fettig, an OSP explosives expert, was told by his supervisor, Lieutenant McCollum, to remove and to dispose of the allegedly explosive material[3] found in

[3] The defendants stipulated, solely for the purpose of the motion to suppress, that the material was dynamite. We shall also refer to it as dynamite for the purpose of simplicity, recognizing that it was never established whether the material was or was not dynamite.

the station wagon. Fettig arrived in Ontario the next afternoon, November 16, 1975, inspected and disposed of the material. First, the garage was cleared of people except for Fettig and the FBI and OSP personnel who photographed the material located in the car. The seven cases were removed from the station wagon and placed in the trunk of Fettig's patrol car. The trunk was tied down and the material was placed on blankets. Two of the cardboard cases were quite wet, and one fell apart as it was being placed into the patrol car. Fettig transported the material to a pistol range 5 miles from Ontario.

Fettig removed two sticks from each case, removed their wrappers, scraped the wrappers clean, and retained the wrappers as evidence. The wrappers were handed to the FBI agent on the scene, and both OSP and FBI personnel photographed the process. Fettig detonated first one stick and then three additional sticks. The detonations were witnessed and photographed. The rest of the material—the cardboard cases, the plastic liners, and the remaining wrappers—was burned. This, too, was photographed. Part of the residue was buried, and part was hauled away by the Oregon Highway Department.

The superseding indictment charged all of the appellees with three counts relating to unregistered and unnumbered "destructive devices"[4] (the "dynamite counts") and with one count of interstate transportation of firearms bearing altered or obliterated serial

[4] They were charged with violations of 26 U.S.C. § 5861(d) (Count I); 26 U.S.C. § 5861(i) (Count II); and 26 U.S.C. § 5861(j) (Count II). The "firearms" in these counts were 26 U.S.C. § 5845(f) "destructive devices."

numbers[5] (the "firearms" count").[6] Evidence supporting the firearms count was discovered in the motor home; the evidence supporting the dynamite counts was discovered in the station wagon.[7]

On March 22, 1976, appellees moved to suppress all photographs, testimony, and other evidence relating to the destroyed dynamite. Both sides presented expert witnesses who testified about the handling of explosives. The Government's expert was Trooper Fettig. The person who made the decision and ordered the destruction of the dynamite, Lt. McCollum, did not testify. The Government also presented the photographs taken of the disposal process. Nichols, an FBI laboratory scientist, testified that his chemical analysis of the retained wrappers revealed all but one of the ingredients of the type of dynamite alleged in the indictment. The missing ingredient was the nitric ester, indicating nitrated ethylene glycol or its derivative, nitroglycerine.

After some further procedural skirmishing, the district court, on March 31, 1976, granted the sup-

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[5] Count IV charged a violation of 18 U.S.C. § 922(k).

[6] Count V charged Banks only with possession of firearms by one previously convicted of a felony; it alleged a violation of 18 U.S.C. App. § 1202(a).

[7] The federal search warrant, granted on November 16, 1975, applied to both vehicles. The federal search occurred subsequent to the state search, although FBI agents were present at both. The inventories attached upon return were not as clear as they could have been, but they indicate the components alleged to have been intended to be combined into a destructive device were in the station wagon. Besides, any uncertainty must be resolved against those executing the warrant and in favor of supporting the findings of the district court.

pression motion on due process grounds. The Government filed its appeal from the suppression order on April 19, 1976, and simultaneously sought a continuance of the May 12, 1976, trial date pending the determination of the appeal. The district court denied the continuance on the following day. When the case was called for trial on May 12, 1976, the Government answered not ready and advised the court that it was unwilling to proceed to trial. The district court thereupon dismissed the indictment with prejudice, pursuant to Rule 48(b) (Fed. R. Crim. P. 48(b)), and the Government filed its appeal from the order dismissing the indictment.

I

The Government first contends that it cannot be charged with responsibility for the destruction of the evidence because it did not have possession or control of it. "The Government," it says, "had nothing to do with the disposal process and could do little but try and record as much of the process as circumstances at the time would allow." The Government's modesty was not revealed to the district court, nor is it supported by the record. We could ignore the Government's argument because it is presented for the first time on appeal. However, we choose to address the question. The record reveals that the FBI was an active participant in all of these proceedings. The whole process was a cooperative federal-state effort. FBI agents were present during the searches and during the destruction of the evidence. They were neither disinterested bystanders nor casual reporters of the events that they witnessed; rather, they acted with the state officers in the destruction venture. The

district court's implicit finding of federal involvement is amply sustained by the record.[8]

Although the facts evidencing federal participation in the search and in the subsequent destruction of evidence are far stronger in this case than the activity of the federal official who was involved in the search considered in *Lustig v. United States* (1949) 338 U.S. 74, the language of *Lustig* is nevertheless instructive. In *Lustig*, the federal officer did not request the search nor was he the "moving force of the search, and that search was not undertaken by the police to help enforcement of a federal law. But search is a functional, not merely a physical, process. . . . Had Greene [the federal officer] accompanied the city police to the hotel, his participation could not be open to question even though the door of Room 402 had not been opened by him . . . . [A] search is a search by a federal official if he had a hand in it . . . ." (*Id.* at 78.) The FBI's hands were prominently displayed throughout the transactions from the search through the destruction of the evidence. Federal participation in the destruction of evidence should not be measured by a standard any different from that applied to the search for evidence considered in *Lustig*.

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[8] United States v. Higginbotham (9th Cir. 1976) 539 F.2d 17, and United States v. Trenary (9th Cir. 1973) 473 F.2d 680, are inapposite. In the former case, the Government did not enter the picture until after photographs, used by local police in an identification display, had vanished. In the latter, marijuana was destroyed by the Mexican police in Mexico. An American customs officer performed interpreting services. He did not have jurisdiction to assert any official authority in Mexico. The federal government's role and the activity of the customs officer in *Trenary* were not comparable to the situation in the case as bar.

II

The district court concluded from the evidence that the Government was chargeable with deliberately destroying material evidence,[9] which deprived the appellees of due process, from which violation prejudice to the appellees was presumed. Good faith of the officers in destroying the evidence did not prevent the due process violation, nor did it shift the burden of proving prejudice to the appellees. We agree with the district court.

Governmental participation in withholding, destroying, or causing the loss of evidence in a criminal case always has due process implications. The impact of a due process violation, including the selection of an appropriate remedy, involves consideration of a number of subjective and objective factors, including the deliberateness of the governmental conduct, the good or bad faith of the official, and the importance of the evidence to the defense of the case.[10] The more

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[9] The agents and troopers fully realized that evidence was being destroyed in contrast to the hospital technician in United States v. Sewar (9th Cir. 1972) 468 F.2d 236, 238, who did not realize that blood samples relevant to a drunk driving charge should be preserved. (*See also* United States v. Miranda (2d Cir. 1975) 526 F.2d 1319 (inadvertent or negligent loss); United States v. Carpenter (D.C. Cir. 1975) 510 F.2d 738 (negligence by company hired by court to transcribe preliminary hearing testimony); United States v. Bridges (7th Cir. 1974) 499 F.2d 179 (no showing that acetone swabbings deliberately destroyed).)

[10] *See* Comment, "Judicial Response to Governmental Loss or Destruction of Evidence" (1972) 39 U.Chi.L.Rev. 542, 563-65. *See generally* Clinton, "The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials" (1976) 9 Indiana L.Rev. 711, 829, 841-48.

intentional and inexcusable is the governmental conduct, the greater are the sanctions against the Government and the less is the burden on the defendant to show prejudice. When the Government intentionally destroys or causes the loss of evidence before or during trial, a due process violation emerges without any showing by a defendant that the challenged evidence would have helped him.[11] (*E.g., United States v. Tsutagawa* (9th Cir. 1974) 500 F.2d 420; *United States v. Mendez-Rodriguez* (9th Cir. 1971) 450 F.2d 1.) The Government's motives in destroying or causing the loss of evidence are only important in this setting to determine the severity of the sanction to be imposed on the Government. Thus, bad faith will require automatic reversal of a criminal conviction, or dismissal of an indictment. (*E.g., United States v. Keogh* (2d Cir. 1968) 391 F.2d 138; *see United States v. Gerard* (9th Cir. 1974) 491 F.2d 1300.) Good faith does not eliminate the due process violation (*United States v. Tsutagawa, supra,* 500 F.2d 420), but it is a factor to be taken into account in conjunction with other factors, such as the importance of the evidence to the defense, in assigning the burden of proving prejudice or nonprejudice and in fashioning an appropriate remedy for the violation. (*E.g., Brady v. Maryland* (1963) 373 U.S. 83;

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[11] Negligent or unintentional loss or destruction of evidence is not involved in our case. Thus, a number of cases on which the Government relies are not in point. (*E.g.,* United States v. Augenblick (1969) 393 U.S. 348 (Jencks Act material inadvertently lost); United States v. Sewar (9th Cir. 1972) 468 F.2d 236 (negligent failure to preserve blood sample relevant to drunk driving charge); United States v. Heiden (9th Cir. 1974) 508 F.2d 989, 903 ("[N]o evidence that the box and package of marijuana were not inadvertently destroyed. . . .").)

United States v. Young (9th Cir. 1976) 535 F.2d 484.)

No lengthy exegesis of prior authority is necessary in this case because neither the existence of the due process violation nor the propriety of the remedy applied involves any balancing of subtle factors. Part of the material destroyed was primary tangible evidence of the offense charged—the dynamite counts were all based on possession of an explosive, "destructive device."[12] None of the material was saved to permit independent testing of the substance.[13] The

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[12] The case is thus unlike those in which corroborating, impeaching, or collateral evidence was destroyed. (*E.g.,* United States v. Harris (9th Cir. 1976) 543 F.2d 1247 (FBI agent's rough notes destroyed; violation of Jencks Act): United States v. Carrasco (9th Cir. 1976) 537 F.2d 372 (informer's diary destroyed).)

[13] This facet distinguishes *Loud Hawk* from those cases where a sufficient sample was retained. (*E.g.,* United States v. Young (9th Cir. 1976) 535 F.2d 484 (bulk of drug seizure destroyed but samples retained); United States v. Heiden (9th Cir. 1974) 508 F.2d 898 (semble); United States v. Shafer (7th Cir. 1971) 445 F.2d 579, 582 (samples from each container of powder made available to defense); *cf.* United States v. Rojas (5th Cir. 1974) 502 F.2d 1042 (cassette tape of drug sale damaged by tape malfunction, defendant given opportunity to have tape repaired by his own expert). *See also* United States v. Pollock (D. Mass. 1975) 402 F. Supp. 1310 (cocaine possession charge, defendant granted access to sample to have independent chemical analysis performed); United States v. Hrubik (D. Alaska 1968) 280 F. Supp. 481 (defendant granted access to water sample for independent testing); United States v. Taylor (E.D.N.Y. 1960) 25 F.R.D. 225 (sale of narcotics charge, access to sample granted for defense analysis); Note, "The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine," 75 Colum. L.Rev. 1355 (1975).

Government also participated in destroying cartons and containers that may have had fingerprints or other indicia by which those who handled the items could have been identified.[14] The secondary evidence could not and did not preserve the evidence destroyed. Here, as in *United States v. Tsutagawa, supra*, 500 F.2d 420, the Government deliberately, though in good faith, effectively destroyed material and potentially material evidence without notice to the prospective defendants or their counsel. The Government sought no court order directing the destruction.

The Government contends that no due process violation was proved and that suppression of the secondary evidence was incorrect because its good faith destruction of the evidence was reasonable to protect the public safety and because the appellees did not establish prejudice. The district court was not persuaded that the dynamite provided any substantial threat to public safety. Lt. McCollum, who made the destruction decision, did not testify. "Without such testimony," the district court appropriately concluded, "the only evidence presented was that the dynamite was no more dangerous or sensitive than 'normal' dynamite and that the water soaked sticks were less sensitive, if anything, than 'normal' dynamite." A commercial magazine was available in which to store the dynamite, and the OSP had a vehicle which could

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[14] The OSP and FBI attempted to take fingerprints from both vehicles and many of the objects within them. However, they did not attempt to discover fingerprints on either the plastic bags or the cardboard boxes, and the destruction therefore prevented those defendants not traveling in the station wagon from rebutting the dynamite counts with evidence that their fingerprints were not on the dynamite containers.

safely transport one and one half cases of explosives at a time the 60 mile distance to the magazine. In short, the Government failed to prove that this dynamite posed any more danger to the public than other kinds of weaponry that can be transported and stored pending trial. The public safety feature is, of course, irrelevant to the destruction of the liners and containers. We thus have no occasion to decide whether the public interest in safety so far outweighs a defendant's interest in access to material evidence that a defendant's due process right must yield, at least in absence of his proving prejudice.

In this pretrial proceeding, we agree with the district court that prejudice to the appellees from the destruction of the evidence is presumed under the circumstances of this case.[15] As we have pointed out, destruction of all of the substance that was the very foundation of the dynamite counts cannot reasonably be described as nonprejudicial. As to the cartons and liners, the Government's own acts made it impossible

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[15] Harmless error doctrines are inapposite in this pretrial context. The effect of the loss of the evidence upon the defendant is not of the factors taken into consideration in deciding whether a due process violation has occurred. It is double counting to inquire whether the destruction was harmless, or even harmless beyond a reasonable doubt, when harm is presumed to establish the due process violation. (*See, e.g.*, Field, "Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale" (1976) 125 U.Pa. L.Rev. 15, 29.) By the same token cases reviewing harmfulness after a conviction are not helpful. (E.g., Killian v. United States (1961) 368 U.S. 231; United States v. Henry (9th Cir. 1973) 487 F.2d 912; United States v. Shafer (7th Cir. 1971) 445 F.2d 579; United States v. Bryant (D.C. Cir. 1971) 439 F.2d 642; Munich v. United States (9th Cir. 1966) 363 F.2d 859.)

for the appellees to ascertain what could have been discovered from an examination of them. The Government offered no excuse at all for destroying them. A presumption of prejudice in favor of the appellees is the only means available to protect them from the unfairness that inheres in the Government's unilateral choice in placing that evidence completely beyond the appellees' and the court's reach. (*Cf. Brady v. Maryland, supra*, 373 U.S. 83; *United States v. Tsutagawa, supra*, 500 F.2d 420.)

III

Suppression of the secondary evidence was tantamount to a dismissal of the dynamite counts because, without that evidence, proof of the existence of an explosive, a necessary element of the offense, was lacking. Outright dismissal of those counts would also have been appropriate. (*Cf. United States v. Roviaro* (1957) 353 U.S. 53; *United States v. Reynolds* (1953) 345 U.S. 1, 12.)

The Government argues that the district court erred in dismissing the remaining counts of the indictment when the Government refused to proceed to trial on them. We have the same difficulty as did the district court in understanding the basis for the Government's contention that the district court could not force the Government to trial on the non-dynamite counts because to do so would destroy its right to appeal from the suppression order.[16] But, even if

[16] "THE COURT: I am ready to try the case commencing today. Both parties have had ample time to prepare. The defendants are ready to go to trial. For some reason, which I do not understand, the Government is not, even though two of the counts are not concerned with the subject of previously suppressed evidence. [13 R.T. at 4-5 (May 12, 1976)].

"....

"THE COURT: ....

... this dismissal of the indictment is with prejudice, unless the Ninth Circuit decides otherwise and remands the case or some part of it for trial.

....

"[Assistant to U.S. Attorney]: ... we believe the Court lacks jurisdiction to dismiss this indictment with or without prejudice in view of the Government's good faith intent—

"....

"THE COURT: ... nothing that I have done or intend to do here will in any way prevent the Court of Appeals from ruling on my order to suppress and indeed reinstate this case for trial as to all five counts.

"....

"[U.S. Attorney]: ....

"... the Government disagrees with the Court's conclusion that the evidence which has been suppressed is not appropriate for introduction or consideration in the remaining counts. Part of the reason we are not going ahead with the trial now is that the Government's view and theory of this case is [that the] evidence which is suppressed bears directly upon motive and intent particularly as well as upon the veracity of the balance of the Government's case with respect to the remaining counts." (*Id.* at 8-13.)

The Government argument seems to be that the certification provisions in section 3731 permit the prosecution to determine what counts of a multi-count indictment involve suppressed evidence. In view of the requirement that the statute is to be narrowly construed so as to avoid creation of new categories of appeals (*see* United States v. Sisson (1970) 399 U.S. 267), we do not think the Government is entitled to an appeal concerning what is, in effect, the question of admis-

there were a foundation for that contention, it would not help the Government because the Government deliberately chose to submit to the dismissal of the re-

maining counts rather than to go to trial.[17] Moreover, the district court exercised both the caution and provided the forewarning of impending dismissal required by *United States v. Simmons* (9th Cir. 1976) 536 F.2d 827.[18]

AFFIRMED.

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sibility of the dynamite evidence at a trial of the firearms count. If the issue had arisen at trial and if the evidence were excluded, the Government would have no appeal. (*Id.* at 291-99.) The relevant portion of section 3731 was intended to permit appeals of the suppression issue, not appeals of evidence issues concerning the suppressed evidence's relevancy or admissibility at trial. The overriding purpose of Congress to rationalize the law of suppression is not served by appeals involving points of evidence law. (*Cf.* United States v. Towill (9th Cir. 1977) 548 F.2d 1363, 1368 (denial of Government motion to dismiss indictment not appealable). *See generally* 114 Cong. Rec. 16297-98 (1968) (remarks of Rep. Pollack that § 3731 incorporates language of H.R. 8654, 90th Cong., 1st Sess. (1967)); 113 Cong. Rec. 24947 (1967) (remarks of Rep. Railsback, sponsor of H.R. 8654, indicating need for appellate resolution of inconsistent trial court rulings). See also H.R. Rep. No. 603, 90th Cong., 1st Sess. (1967).)

[17] "[U.S. Attorney]: [W]e will take our chances on getting this Court reversed by the Ninth Circuit with respect to that evidence and . . . will suffer a dismissal at this time if the Court should choose to do so rather than go to trial on the imperfect case that we would have to present if we were forced to trial now." (12 R.T. at 6 (April 26, 1976).)

[18] There was no surprise because the Government itself suggested dismissal on April 26, 1976, but refused to move for it for fear of mooting its suppression appeal. (12 R.T. at 5-7). The court proceeded cautiously in view of the facts that the Government had designated the defendants as "high risk" on February 20, 1976 (3 C.T. at 472), and that the District of Oregon Speedy Trial Act Plan might not have

TRASK, Circuit Judge, dissenting:

I respectfully dissent.

In its first assignment of error, the government contends that the district court incorrectly granted appellees' motion to suppress all photographs, testimony, and other evidence relating to the destroyed dynamite.[1] The government argues that it was not responsible for the destruction of the dynamite and therefore should not be penalized by suppression. Assuming *arguendo* that it was responsible for the destruction, the government argues that suppression was improper under the established law of this circuit. It is the government's contention that to justify suppression, the district court must find either that the government destroyed the evidence in bad faith or that the defendants are prejudiced by the destruction. As neither fact was established below, the government argues that the district court erred in granting appellees' motion to suppress.

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allowed any extension beyond the 90 day limit. (18 U.S.C. § 3164(b); United States District Court for the District of Oregon, Plan for the Prompt Disposition of Criminal Cases, III §§ 7(a), 10 (1976).) Given these speedy trial concerns even unconditional dismissal of all counts of the indictment was not an obvious error. (United States v. Cox (9th Cir. 1973) 475 F.2d 837, 841.)

[1] The majority takes the position that the explosive material was never established as dynamite. I merely note that (1) the material in the seven cases was labeled "Explosives Dangerous, Gelex 2, 70% strength, Dupont," (2) all of the witnesses referred to the explosive material as "dynamite," and (3) the cases containing the material were labeled "High Explosives Dangerous" and were identified by expert Fettig on visual examination as containing dynamite. Even more conclusively, it exploded on detonation.

The government's contention that it did not have possession or control of the dynamite evidence is meritorious. The initial stop on the highway took place on November 14, 1975. This was entirely a state operation.[2] It immediately developed into a shooting skirmish and escape into the darkness on the part of two of the persons in the motor home before any preliminary questioning should take place. The vehicles were subsequently impounded by the state. On Saturday, November 15, state search warrants were obtained and executed by state officials.[3] Items found in the two motor vehicles included seven cases of dynamite, semi-automatic rifles, police shotguns, handguns, more than 2,600 rounds of ammunition, 150 blasting caps, nine pineapple empty training hand grenades, pocket watches prepared to detonate time bombs, batteries, and wire.

As a result of the discovery of the dynamite in the seized vehicles, a call was made by Lieutenant McCollum, commander of the arson division of the Oregon State Police, to William Fettig, an explosives expert with the Oregon State Police. McCollum was Fettig's superior officer. He ordered Fettig to pro-

[2] The only possible federal participation was an FBI "all points bulletin" issued November 13, 1975, to be on the lookout for these two motor vehicles. However, the bulletin expressly stated that the vehicles were not to be stopped. The state officer who stopped the vehicles disregarded this instruction.

[3] As noted by the majority in its footnote 7, the FBI made a separate search of the subject vehicles pursuant to a federal search warrant. The federal warrant was obtained and the federal search conducted subsequent to the issuance and execution of the state search warrant. This fact, bolsters rather than detracts from the position that the state and federal authorities were acting independently of each other.

ceed to Ontario, Oregon to destroy the dynamite. Acting under these orders, Fettig drove to Ontario on November 16. After reporting to the Oregon State Police office in Ontario, Fettig proceeded to the place where the station wagon was being held and, in his words, "opened the driver's right rear door and noticed in the inner compartment of the station wagon, with the seats laid down, that in a greenish-black visquine bag there was dynamite." Officer Fettig next transferred the dynamite from the station wagon to the trunk compartment of his patrol car. He then drove to a pistol range five miles from the city with a patrol car ahead of him and one behind him. At that remote place, some of the dynamite was detonated and the remainder burned.[4] Pictures were taken by Oregon State Police and FBI personnel of the dynamite detonation and burning.

A detailed examination of the records available in this case reveals that the FBI was not a participant in the search for and destruction of evidence. The record establishes that the evidence was seized by *state* officials pursuant to *state* search warrants after the vehicles in question were stopped by *state* law enforcement agents. Further, the record indicates that

[4] In the process of destroying the dynamite, Fettig removed the wrappers from several of the sticks of dynamite and scraped the wrappers clean. Seven of these wrappers, coupled with a "do's and dont's" pamphlet concerning the safe use of dynamite and which was found with the seized explosives, were introduced as evidence at the hearing on appellees' motion to suppress. Also introduced as evidence at the hearing was the testimony of David W. Nichols, a qualified expert employed by the FBI. Nichols testified concerning the chemical composition of the substance scraped from the dynamite wrappers. Nichols was available for and was subjected to cross-examination.

the evidence remained in the hands of *state* officials until *state* authorities determined that the evidence should be destroyed. Finally, the record reveals that it was a *state* law enforcement officer who destroyed the evidence. An FBI agent was present at the destruction of the evidence. However, mere attendance does not justify the creation of a federal-state partnership through which the actions of state agents become imputable to their federal counterparts. The FBI agent in attendance took photographs of the evidence and its destruction. However, such activities appear clearly to involve the preservation of evidence, not its destruction. Therefore, I believe that the majority's broad characterization of the federal agents as joint venturers in the destruction of the evidence cannot withstand scrutiny.

The majority relies on *Lustig v. United States*, 338 U.S. 74 (1949), in arguing that the government was responsible for the destruction of the evidence. *Lustig*, a search and seizure case, is factually distinguishable from the instant case. In *Lustig*, a Secret Service Agent received word from local police that they suspected a counterfeiting operation was going on in a room of a local hotel. The local police obtained a search warrant and entered the room while the Secret Service Agent, Greene, remained at the police station. Upon discovery of evidence of federal counterfeiting crimes, Greene was notified by the local police. He went to the hotel and examined the evidence in controversy. The Court held that the illegal search conducted by the local police was imputable to the federal agent.

> "Though state officers preceded Greene in illegally rummaging through the bags and bureau drawers in Room 402, they concerned themselves

> especially with turning up evidence of violations of the federal counterfeiting laws after Greene joined them. He was an expert in counterfeiting matters and had a vital share in sifting the evidence as the search proceeded. He exercised an expert's discretion in selecting or rejecting evidence that bore on counterfeiting. The fact that state officers preceded him in breach of the rights of privacy does not negative the legal significance of this collaboration in the illegal enterprise before it had run its course. Greene himself acknowledged such participation by his remark about 'leaving the room after we had gathered all this evidence together.'" *Id.* at 79.

The federal officer in *Lustig* actively participated in the search which the city police illegally began. Here, however, the federal officer's only activity in the entire series of events was to preserve as much evidence of the dynamite as possible. The decisions regarding what to do with the dynamite, where to do it, and when, were entirely and exclusively made and carried out by the Oregon State Police.

The majority's characterization of *United States v. Higginbotham*, 539 F.2d 17 (9th Cir. 1976), and *United States v. Trenary*, 473 F.2d 680 (9th Cir. 1973), as inapposite cannot be supported. In *Higginbotham*, the appellant was convicted on a Dyer Act charge. Shortly after appellant's arrest, an officer of the Boise, Idaho Police Department put together a photographic display composed of 18 photographs, one of which was of appellant. During pretrial proceedings, appellant's photograph was readily identified from among the pictures constituting the display. At trial the display could not be produced because it had been broken up and the pictures re-

turned by local police to their files. Before this court, appellant complained that the failure to produce the display denied him due process. The contention was rejected, Judge Kilkenny stating:

> "Here is a proper place to emphasize that the fifteen photographs were never in the possession of the prosecutor, the FBI or any other United States government agency. The Boise police, under these facts, cannot be said to be acting on behalf of the federal government but rather on behalf of the State of Idaho. *Cf. United States v. Smith*, 433 F.2d 1266 (CA5 1970). Under such circumstances we should be reluctant to impute to the federal government the mistakes, particularly relatively innocent ones, committed by local police. Moreover, the demand to produce these photographs might well be likened to an attempt to require production under the Jencks Act of statements in the possession of state police. See *Beavers v. United States*, 351 F.2d 507 (CA9 1965), where the statements were never in possession of the United States and production was not required. By analogy, it is evident that the United States is in no way responsible for the actions of the Boise police in disposing of the fifteen photographs by inadvertance or otherwise." *Id.* at 21.

In the present case, the two motor vehicles and the dynamite were likewise never in the possession of the federal authoriites. The state police had its own policy for handling dynamite in situations such as this and proceeded to follow that policy. Even assuming that the dynamite could have been handled in a different and possibly better way, Officer Fettig

was under orders to proceed as his superiors commanded and his actions cannot be charged to have been taken in bad faith.[5]

United States v. Trenary, supra, involved an appeal from a conviction for conspiracy to import marijuana from Mexico. The marijuana and duffle bags containing it had been destroyed by the Mexican police before trial. There being no charge of bad faith or negligence by the United States, secondary evidence was admissible at the trial. *Trenary* is another example of the refusal of this court to impute to the federal government the loss or destruction of evidence by other authorities over whom it has no authority or control.

In summary, I find that the record cannot support a finding of federal involvement in the destruction of the dynamite by state officials. As the government was not responsible for the destruction, I would follow the case law of this circuit (*United States v. Higginbotham, supra*, and *United States v. Trenary, supra*) and hold that the district court erred in suppressing the photographic and testimonial evidence of the destroyed dynamite. Therefore, I would reverse the order of the district court granting appellees' motion to suppress and would remand the cause with instructions to deny appellees' motion.

Assuming *arguendo* that responsibility for the destruction of the evidence can be imputed to the federal government, the government argues that the district court ignored established case authority in ruling favorably on appellees' motion to suppress. I agree.

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[5] The trial court expressly found that "[t]here was no evidence that the destruction in this case was in bad faith . . . ." Order Suppressing Evidence at 5.

The law of this circuit governing the present controversy is clear. When the government loses or destroys tangible evidence prior to trial, a motion to suppress photographic, testimonial, or other evidence related thereto will be granted by the trial court if defendant can show: (1) bad faith or connivance on the part of the government, or (2) that he was prejudiced by the loss of the evidence. *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); see also *United States v. Young*, 535 F.2d 484, 488 (9th Cir. 1976); *United States v. Heiden*, 508 F.2d 898, 902 (9th Cir. 1974); *United States v. Henry*, 487 F.2d 912 (9th Cir. 1973): Both the district court and the majority here on appeal fail to apply the test of *United States v. Sewar* and its progeny. Instead, the majority sanctions the substitution by the district court of a new standard: the possible prejudice to a criminal defendant caused by the destruction of evidence is balanced against the government's reasons for the destruction.[6]

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[6] The trial court's rationale on the presumption of prejudice created by the destruction of the dynamite is unique. The court stated:

> "Balancing the possible prejudice to the defendants against the government's reasons for the destruction, I must find in favor of the defendants. Because of this destruction, it is impossible for the defendants to show that they have been prejudiced but neither can the possibility of such prejudice be rebutted. In this situation, a presumption of such prejudice is created. This presumption, however, can be outweighed by valid reasons for the kind of destruction that took place here." Order Suppressing Evidence at 4.

Such reasoning escapes me. It appears to be a *non-sequitur*. No authority is cited for this rationale.

The majority, while never explicitly rejecting the established rule of this circuit, does attempt to distinguish several of the cases which have used the rule. The majority observes that the destruction in the present case was accomplished by agents who understood that the destroyed materials would be important to subsequent criminal proceedings. Additionally, the majority notes that no samples of the destroyed evidence were retained by the agents. According to the majority, these factors, alone or in combination, distinguish the instant case from those cases which have applied the *Sewar-Heiden* test.

The distinctions drawn by the majority are without significance. The recent case of *United States v. Young, supra*, applied the *Sewar-Heiden* test to a situation in which it was obvious that the government agency destroying the evidence understood its value to future criminal proceedings. In *United States v. Henry, supra*, and *United States v. Sewar, supra*, government agents destroying the evidence failed to preserve samples; yet the *Sewar-Heiden* test was applied in both cases. It is clear from the case law in this area that the distinctions offered by the majority have never affected the applicability of the *Sewar-Heiden* test.

Applying the *Sewar-Heiden* test to the facts of the present controversy, I find that appellees established neither that the government acted in bad faith in destroying the dynamite nor that appellees were prejudiced by the destruction. The trial court's findings accord with my views. The trial court expressly held that "[t]here was no evidence that the destruction in this case was in bad faith . . . ." Order Suppressing Evidence at 5. In addiiton, the trial court also held that appellees failed at the suppression hearing to

establish that they were actually prejudiced by the destruction.[7] The trial court went further, however, and presumed prejudice to appellees from the fact of the destruction.

The presumption of prejudice introduced by the trial court was improper. None of this court's decisions dealing with the destruction of evidence sanction such a presumption. Instead, all make an inquiry into the destruction to ascertain whether the defendants were prejudiced thereby. *See, e.g., United States v. Young, supra,* at 488; *United States v. Heiden, supra,* at 903; *United States v. Henry, supra,* at 913; and *United States v. Sewar, supra,* at 238. Not only is a case-by-case examination for prejudice the established practice of this circuit, but it is also far superior to a blanket presumption in reaching just results. Presuming prejudice from the fact of destruction in effect nullifies the *Sewar-Heiden* test. The fact of destruction leads to a presumption of prejudice. Prejudice requires suppression. Defendants automatically prevail; the government always loses; the issue of justice is ignored. Clearly, the presumption of prejudice has no place in the application of the *Sewar-Heiden* test.

Having determined that the trial court improperly presumed prejudice, and further noting that the trial court expressly found that the government did not destroy the evidence in bad faith and that appellees failed to establish that they were prejudiced thereby, I find that suppression is not mandated under the *Sewar-Heiden* test. Therefore, even assuming *arguendo* that the federal government was responsible

[7] Specifically, the trial court declared: "[I]t is impossible for the defendants to show that they have been prejudiced . . . ." Order Suppressing Evidence at 4.

for the destruction of the evidence, I would reverse the order of the district court granting appellees' motion to suppress and would remand the cause with instructions to deny appellees' motion.

In its second assignment of error, the government contends that the district court incorrectly dismissed the indictment against appellees. The district court's order dismissing the indictment was founded on Rule 48(b) of the Federal Rules of Criminal Procedure. That rule authorizes the court to dismiss an indictment whenever there has been "unnecessary delay in bringing a defendant to trial." The government argues that the delay in prosecuting appellees has not been "unnecessary," and consequently that the district court abused its discretion in dismissing the indictment. Assuming *arguendo* that the district court did not err in dismissing the indictment, the government contends that the court below did err in dismissing the indictment with prejudice. While dismissal with prejudice is authorized by Rule 48(b), the government points out that such power is to be utilized with caution and only after a forewarning to the prosecution that dismissal with prejudice will result from a failure to proceed to trial. *United States v. Simmons,* 536 F.2d 827, 834 (9th Cir. 1976). The government argues that the trial court failed both to exercise the requisite caution and to provide the required forewarning, and thus improperly dismissed the indictment with prejudice.

In examining the government's second assignment of error, the merits of its arguments are best demonstrated if the dynamite and nondynamite counts are analyzed separately.

The dynamite counts. The delay in prosecuting appellees on the dynamite counts has not been unneces-

sary under Rule 48(b). The government had a statutory right to appeal the suppression order as it applied to the dynamite counts. The delay has been necessary to permit the meaningful exercise of that statutory right.

The government has been granted the right by statute to appeal suppression orders entered by the district court. That right is set forth in 18 U.S.C. § 3731. Section 3731 provides in pertinent part:

> "An appeal by the United shall lie to a court of appeals from a decision or order of a district court suppressing . . . evidence . . . not made after the defendant has been put in jeopardy . . . if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."

The government's right to appeal is available conditionally. First, the appeal is not available if the defendant has been put in jeopardy. Second, the appeal must not be taken for purpose of delay. Third, the evidence suppressed must be substantial proof of a fact material in the proceeding. Clearly, these conditions were met in the context of the dynamite counts. (1) Appellees have yet to be placed in jeopardy. (2) The appeal was not taken for purpose of delay. The delay in bringing appellees to trial was necessary to permit the government to effectively exercise its statutory right to appeal. If the government had been forced to proceed to trial on these counts pending the outcome of the appeal, jeopardy would have attached, the appeal would have become moot, and the government's right to appeal the suppression order would have been effectively denied.

(3) The suppressed evidence was critical in establishing a necessary element of the alleged offenses, the existence of an explosive device.

In summary, the government had a statutory right to appeal the suppression order if certain conditions were met. Those conditions were satisfied as to the dynamite counts. Delay was necessary to permit the government to effectively take its appeal. Clearly, such a delay, necessary to give effect to a statutory right, cannot be deemed "unnecessary" for purposes of Rule 48(b). Therefore, I would hold that the district court erred in dismissing the dynamite counts pursuant to Rule 48(b); I would reverse that portion of the district court's order dismissing these counts; and I would remand the cause to the district court with instructions to reinstate the indictment as to these counts. Because I would rule that the dynamite counts were improperly dismissed, it is unnecessary for me to examine whether the two-pronged test of *United States v. Simmons*, *supra*, was met to justify dismissal of these counts with prejudice.

The majority, in sustaining the district court's dismissal of the dynamite counts, does not rely on the district court's erroneous application of Rule 48(b). Instead, the majority observes that suppression of the evidence was tantamount to dismissal of the dynamite counts because an essential element of the dynamite counts was not incapable of proof. My disagreement with the majority's approach is simple. I believe that the suppression order was improperly granted.

The nondynamite counts. The delay in prosecuting appellees on the nondynamite counts of the indictment has been unnecessary for Rule 48(b) purposes. As previously discussed, the government's right (via

section 3731) to appeal a district court's order suppressing evidence is conditional. One of the conditions is that the evidence suppressed must be substantial proof of a fact material in the proceeding. This condition must be met before appeal of the suppression order can properly be taken. Despite the government's protests to the contrary, the suppressed evidence is not substantial proof of any material fact in the nondynamite counts of the indictment. The trial court found as much. (13 R.T. at 5.) Given the government's failure to satisfy this condition, its appeal of the suppression order as it relates to the nondynamite counts was improper and the delay in prosecution occasioned by this appeal has been unnecessary under Rule 48(b). Therefore, I would find that the court below properly dismissed these counts of the indictment.

Having determined that the trial court properly dismissed the nondynamite counts of the indictment, I turn now to the propriety of dismissing those counts with prejudice. In *United States v. Simmons, supra,* at 834, this circuit held that even though dismissal with prejudice is authorized by Rule 48(b), trial courts should utilize such power with caution and only after a forewarning to the prosecution that dismissal with prejudice will result from a failure to proceed to trial. The government argues that the requisite caution and forewarning required by *Simmons* were absent in the trial court's dismissal of the nondynamite counts with prejudice.

Taking the prongs of the *Simmons* test in reverse order, I find the record devoid of any forewarning to the prosecution that the nondynamite counts of the indictment would be dismissed with prejudice. The district court's entry dismissing these counts contains no reference to a forewarning of impending dismissal wth prejudice. The remainder of the record is equally as barren.

The majority, notwithstanding the state of the record, attempts to create the requisite forewarning from a declaration made by the United States attorney at a hearing conducted several days prior to dismissal. At the hearing the government counsel observed: "[W]e will suffer a dismissal at this time if the Court should choose to do so rather than go to trial on the imperfect case that we would have to present if we were forced to trial now." (12 R.T. at 6.) This statement is touted by the majority as sufficient forewarning to satisfy the requirement of *Simmons.* The majority, in making such a claim, is plainly in error. First, the statement was made by the government, not the trial court. It is the trial court that is required to forewarn the prosecutor, not vice versa. Second, and far more important, the government's statement indicates that it was prepared to suffer dismissal. Nothing is said concerning its preparedness to suffer dismissal with prejudice. As indicated in *Simmons,* at 837, it is not enough to forewarn that dismissal may result from a failure to proceed to trial. Rather, the prosecution must be forewarned that the dismissal will be with prejudice.

Having determined that the trial court failed to provide the required forewarning to the prosecution, it is unnecessary to examine whether the court exercised caution in dismissing the nondynamite counts with prejudice. The test in *Simmons* is two-pronged, and failure to satisfy either prong is sufficient to warrant reversal of the order dismissing with prejudice. Given the failure of the trial court to provide the forewarning mandated by *Simmons,* I would re-

verse that portion of the trial court's order dismissing the nondynamite counts with prejudice and would remand the cause to the district court for further consideration of its dismissal of these counts in light of this opinion.

In conclusion, I would reverse the orders of the district court granting appellees' motions to suppress and to dismiss the indictment with prejudice. Further, I would remand the cause to the district court with instructions: (1) to deny appellees' motion to suppress, (2) to reinstate the indictment as to the dynamite counts, and (3) to reconsider its dismissal of the nondynamite counts with prejudice in light of this opinion. Therefore, I respectfully dissent.

/s/ Ozell E. Trask
United States Circuit Judge

APPENDIX E

UNITED STATES DISTRICT COURT
D. OREGON

CR No. 75-296-RE

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MOSES LOUD HAWK, ET AL., DEFENDANTS

May 20, 1983

OPINION

REDDEN, District Judge:

Defendants Kenneth Loud Hawk, Russ James Redner, Dennis Banks, and KaMook Banks move to dismiss this action on the grounds that their Sixth Amendment right to a speedy trial has been violated. For the reasons set forth below, I grant defendants' motion and dismiss this action with prejudice.

I. *Background*

The facts leading to the arrest and ultimate indictment of the defendants in this case are fully set forth in *United States v. Loud Hawk*, 628 F.2d 1139

(9th Cir. 1979), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1279, 63 L.Ed.2d 602 (1980). Therefore, only a brief recitation of those facts is necessary here.

Defendants Loud Hawk, Redner, and KaMook Banks were arrested by Oregon state police officers on November 14, 1975. These officers impounded the vehicles the defendants were driving and on November 15, 1975 searched the vehicles pursuant to a search warrant. The search disclosed firearms, ammunition, an electric blasting cap, a large quantity of non-electric blasting caps, and material thought by state police to be dynamite. State authorities, without notice to the defendants, destroyed the alleged explosive material on November 16, 1975.

A federal grand jury returned a ten count indictment against defendants Loud Hawk, Redner, KaMook Banks, Dennis Banks,[1] and two other individuals on November 25, 1975, charging all defendants with one count of possession of an unregistered destructive device, eight counts of possession of firearms whose serial numbers had been removed, and charging Dennis Banks alone with one count of being a felon in possession of firearms. On December 22, 1975, a five count superceding indictment was filed. Two days later defendants filed a motion seeking dismissal of the indictment, or alternatively, suppression of any and all evidence relating to the destroyed dynamite. They argued that the destruction of the evidence constituted a denial of due process since there was no opportunity for defense analysis of the material and the evidence was destroyed before defendants had any chance to object or suggest alternatives.

[1] Defendant Dennis Banks was a fugitive until his arrest in California. He made his first appearance on April 13, 1976.

On March 30, 1976, Judge Belloni granted this motion to suppress. He reasoned that destruction of the dynamite prejudiced defendants because "their inability to observe the destruction and to analyze samples of it deprived them of the opportunity to contest the government's conclusion that the substance destroyed was indeed explosive." He also found that defendants were prejudiced because destruction of the packaging material foreclosed the defense from determining by fingerprint analysis who had handled the boxes.

The government filed its notice of appeal from this order on April 19, 1976. At the same time, the government requested a continuance of the trial date of May 12, 1976, pending resolution of the interlocutory appeal. The government argued that the suppressed evidence was highly relevant to the firearms counts which were to be tried on May 12. Judge Belloni denied the motion for continuance on April 20, 1976. On April 23, 1976, the government moved the Court of Appeals for an order continuing the May 12 trial date. The government based its motion on the same grounds rejected by Judge Belloni. The Court of Appeals also denied the motion for continuance.

At a status conference on April 26, 1976, the government informed Judge Belloni that it would not proceed to trial on the firearms counts. When the case was called for trial on May 12, 1976, the government answered that it was not ready to proceed. All defendants answered that they were ready for trial. In fact, the defendants demanded that trial proceed or that the court dismiss the case with prejudice pursuant to Fed.R.Crim.P.48(b). They argued that their rights under the Speedy Trial Act and the Constitution had been violated.

In response to the motion to dismiss, Judge Belloni stated:

> I think everyone here realizes that this case will be dismissed against these defendants. Both this Court and the Court of Appeals has denied any postponement. I am ready to try this case commencing today. Both parties have had ample time to prepare. The defendants are ready to go to trial. For some reason, which I do not understand, the Government is not, even though two of the counts are not even concerned with the subject of previously suppressed evidence. I do not want to dismiss this case without a trial. The factual and legal dispute should be heard and decided, but there is no way the Court can force the Government to call its witnesses. My only recourse is to dismiss this case against these four defendants.
>
> Clearly, there has been unnecessary delay in bringing these four defendants to trial. Clearly it is the fault of the Government.

Transcript of Proceedings, May 12, 1976, at 4-5. The government admitted that it could have tried the firearms counts without the suppressed evidence. Indeed, the government stated that if the Court of Appeals affirmed the suppression order, it would proceed to trial on the firearms counts. Transcript of Proceedings, May 12, 1976, at 15-16. Judge Belloni, pursuant to Fed.R.Crim.P. 48(b), dismissed the indictment with prejudice.

The government filed its notice of appeal from the dismissal in open court on May 12, 1976.[2] Transcript

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[2] It is interesting to note that, while the Court of Appeals held that the government did not have adequate notice that the indictment would be dismissed, the government had already prepared a notice of appeal which it immediately presented to the trial court in the presence of the defendants.

of Proceedings, May 12, 1976, at 12. On June 11, 1976, the appeals of the suppression order and the order dismissing the indictment were consolidated. The appeals were submitted to a panel of the Ninth Circuit on October 15, 1976. On July 26, 1977, the panel affirmed Judge Belloni's orders. The government petitioned for reconsideration *en banc* on September 7, 1977. The Court granted the government's petition on October 17, 1977.

On March 6, 1978, the Court *en banc* temporarily remanded to the district court for an evidentiary hearing. Judge Belloni held this hearing on May 9 and 10, 1978. At the end of the hearing, Judge Belloni ordered the parties to file proposed findings within two weeks. On June 16, 1978, Judge Belloni granted the government's motion to extend the filing date to July 14, 1978. The record does not indicate the reason why, but the parties did not file their proposed findings until August 1, 1978. Judge Belloni issued findings on the factual issues on August 23, 1978.[3] On August 7, 1979, the Ninth Circuit *en banc* reversed the suppression order and the dismissal of the firearms counts of the indictment to the extent that the dismissal was with prejudice. *Loud Hawk*, *supra*, 628 F.2d 1139. The Court held that dismissal of the firearms counts was proper, but held that the court had failed to give the government the requisite

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[3] During the time this case was on temporary remand, the District of Oregon was entitled to five trial judges. Until 1980, however, the District of Oregon had only three trial judges. In 1980, two additional district court judges were appointed.

"forewarning . . . that dismissal with prejudice will result from a failure to proceed to trial." *Id.* at 1150. The Court of Appeals remanded with instructions to deny the motion to suppress, to reinstate the indictment, and to reconsider the dismissal with prejudice of the non-dynamite counts. After petitions for rehearing and certiorari were denied, the mandate issued on March 12, 1980.[4]

Upon remand, the case was assigned to me. I ruled that the firearms counts could not simply be reinstated. Therefore, the government obtained a superceding indictment from the Grand Jury on June 18, 1980. This indictment recharged defendants with the original firearms count and two of the three original destructive device counts. The new indictment recharged Dennis Banks with being a felon in possession of firearms. The superceding indictment also charged all defendants with two new destructive device counts and charged KaMook Banks with a new count of receiving firearms while under indictment for a felony.

This new indictment prompted motions to dismiss for vindictive prosecution. On August 8, 1980, I dismissed the superceding indictment as to KaMook Banks on the grounds of vindictive prosecution. I denied similar motions on behalf of the other defendants. In August 1980, defendants Loud Hawk, Redner, and Dennis Banks appealed the denial of their motions to dismiss for vindictive prosecution. On September 2, 1980, the government appealed the dismissal as to KaMook Banks. The appeals were consolidated in September 1980 and submitted to a panel of the Ninth Circuit in November 1980.

[4] At the time the Court of Appeals issued the mandate, four years, three months and 16 days had passed from the date of the indictment.

On July 29, 1982, a panel of the Ninth Circuit dismissed the appeals of Redner, Loud Hawk, and Dennis Banks for lack of jurisdiction on the grounds that the denial of a motion to dismiss for vindictive prosecution was not an appealable order.[5] The Court vacated the dismissal of Counts I through V of the indictment as to KaMook Banks. The Ninth Circuit issued the mandate on January 31, 1983.[6]

By minute order on February 25, 1983, trial was set to commence on April 11, 1983. At the request of the government, and over objections by the defendants, I continued the trial date to May 3, 1983. On the court's own motion, trial was continued from May 3, 1983 to May 23, 1983 and finally set to begin on June 13, 1983. Defendants objected to each continuance.

[5] On March 6, 1980, a panel of the Ninth Circuit held that an order denying a defendant's motion to dismiss on the grounds of vindictive prosecution was immediately appealable as a final decision under 28 U.S.C § 1291. *United States v. Griffin*, 617 F.2d 1342 (9th Cir.), *cert. denied*, 449 U.S. 863, 101 S.Ct. 167, 66 L.Ed.2d 80 (1980). This holding was subsequently reversed by the United States Supreme Court in *United States v. Hollywood Motor Car Co., Inc.*, —— U.S. ——, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (*per curiam*). The Ninth Circuit panel then dismissed the appeals of Loud Hawk, Redner, and Dennis Banks based on *Hollywood Motor Car Co. United States v. Banks*, 682 F.2d 841, 844 (9th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 755, 74 L.Ed.2d 972 (1983).

[6] When the mandate from the second appeal was received, seven years, two months and six days had passed from the date of the indictment.

II. *Discussion*

The government contends that this case presents issues of delay encompassing both the Fifth Amendment Due Process Clause and the Sixth Amendment Speedy Trial Clause. The government claims that the approximately four year period between the dismissal on March 12, 1976 and the return of the mandate—which reinstated the indictments—on May 17, 1980 should be scrutinized under the Due Process Clause. Likewise, for KaMook Banks, the government argues that the period between her second dismissal on August 8, 1980 and the return of the mandate vacating that dismissal on January 31, 1983 must be considered under the Due Process Clause.

The defendants contend that the entire period of delay from the date of the indictment to the date of trial, approximately seven years and seven months, must be analyzed under the Speedy Trial Clause.

The Speedy Trial Clause of the Sixth Amendment only applies when a defendant is "accused." *United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 1501, 71 L.Ed.2d 696 (1982). The right to a speedy trial "attaches only when a formal criminal charge is instituted and a criminal prosecution begins." *Id.* A defendant is "accused" for Speedy Trial Clause purposes when he or she has been arrested, indicted, or is otherwise the subject of a criminal prosecution. *Id.*

The United States Supreme Court held in *MacDonald* that "the Speedy Trial Clause has no application after the Government, in good faith, formally drops charges." *Id.* The Court, however, was not faced with, and did not decide, the situation at issue here: whether a person is "accused" during the time a court's dismissal of the indictment, on defendants' motion, is on appeal.

I conclude that the *MacDonald* rationale does not extend to dismissals which are not voluntary by the government. I find that a person is "accused" even after a court dismisses the indictment if the government appeals the dismissal. This is because, on appeal, the dismissal may be reversed and the indictment reinstated. A person remains under prosecution unless and until the court on appeal affirms the dismissal. *See United States v. Bishton*, 463 F.2d 887, 891 (D.C. Cir. 1972) (prosecution ended only upon affirmance of dismissal by court of appeals).

The Court in *MacDonald* noted that its conclusion agreed with the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174. *United States v. MacDonald*, *supra*, 456 U.S. at 7 n. 7, 102 S.Ct. at 1501 n. 7. It noted that the Act specifically provides that if charges are dismissed by the government and later refiled, the period between the dismissal and refiling is not included in computing the time within which trial must begin. 18 U.S.C. § 3161(h)(6). My conclusion also comports with the Speedy Trial Act. The Act, while recognizing that dismissals may occur upon a defendant's motion, does not provide that excludable delay occurs from the date of dismissal to reinstatement of the indictment on appeal. Rather, the Act allows excludable delay only if the indictment is dismissed "upon motion of the attorney for the Government . . ." *Id.*

The fundamental difference between a dismissal by the court and a voluntary dismissal by the government is also shown by Fed. R. Crim. P. 48. Rule 48(a) provides that the prosecution of a defendant terminates upon dismissal by the government. The Rule does not provide, however, that the prosecution terminates upon dismissal by the court for unneces-

sary delay. The logical inference from the difference in language between the two subsections of Rule 48 is that a prosecution does not necessarily terminate upon dismissal by the court.

In this case, there has been but one prosecution during these past seven years. Almost immediately after Judge Belloni issued his order dismissing the indictment on May 12, 1976, the government handed the Judge its notice of appeal from that dismissal. The defendants, who were in court when the United States Attorney handed the Judge the notice of appeal, knew that the dismissal could be overturned on appeal. During the almost four years the case was on the first appeal, the defendants suffered the anxiety of knowing that the dismissal could be reversed at any time and the indictment reinstated. They were not in the same position as a person whose indictment is voluntarily dismissed by the government. As to that person, the government must go before another Grand Jury if it ever wishes to reindict him or her. As to these defendants, the indictment was merely held in abeyance. In fact, after the first appeal, the Court of Appeals reinstated the dynamite counts of the indictment and ordered reconsideration of the dismissal of the non-dynamite counts. Upon remand, I concluded that the non-dynamite counts could not simply be reinstated. The government then obtained a superceding indictment from the Grand Jury, recharging the defendants with the original firearms count and two of the three original destructive device counts, along with other new counts. On the second appeal, the Court of Appeals vacated the dismissal of Counts 1 through V as to KaMook Banks. Thus, as to KaMook Banks it is as if the second dismissal never occurred. The government cannot argue that

she was not "accused" during the pendency of the second appeal. On the second appeal, the indictment had not been dismissed as to Loud Hawk, Redner, and Dennis Banks. They, therefore, also remained "accused" during the pendency of the second appeal.

In summary, I conclude that the entire time between arrest or indictment of the defendants in this case and the time now set for trial must be analyzed under the Sixth Amendment Speedy Trial Clause rather than under the more stringent standard of the Due Process Clause.[7] These defendants have been

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[7] Where the delay occurs before indictment or during a time when the defendant is not considered "accused" for purposes of the Speedy Trial Clause, any delay is evaluated under the Due Process Clause and the defendant bears a heavier burden to establish a constitutional violation. *United States v. Henry*, 615 F.2d 1223, 1232 (9th Cir. 1980). Preaccusation delay is permissible "unless it violates 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *Id.* Under the Due Process analysis, the court must consider the reasons for the delay as well as the prejudice to the defendant. Affirmative proof of actual prejudice is necessary under the Due Process analysis. An affirmative showing of actual prejudice is not necessary, however, to prove a Speedy Trial Clause violation. *Moore v. Arizona*, 414 U.S. 25, 26, 94 S.Ct. 188, 189, 38 L.Ed.2d 183 (1973); *United States v. Henry, supra*, 615 F.2d at 1232 n.12. Under the Due Process analysis, the defendant's proof of actual prejudice must be "definite and not speculative." *Arnold v. McCarthy*, 566 F.2d 1377, 1384 (9th Cir. 1978). The focus in the Due Process analysis is on the nature of the actual prejudice caused by the delay and the legitimacy of the asserted governmental reasons for the delay. *Id.* at 1384 n. 1.

I conclude that, even if the government is correct and the stricter Due Process standard applies to part of the delay in this case, defendants' constitutional rights have been violated. While the case presents a closer question when

under indictment from November 25, 1975 to the present.

The United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972), enunciated the test for determining whether a defendant's Sixth Amendment right to a speedy trial has been violated:

> The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed. A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.
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> . . . We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must

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analyzed solely under the Due Process Clause, I would still dismiss. As noted *infra*, the governmental reasons for the delay do not absolve the government of its duty to bring these defendants to trial in a timely fashion. Also, as noted *infra*, I find the defendants have made an affirmative showing of actual prejudice which is "definite and not speculative." *Id.* at 1384.

> still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Id. at 530 and 533, 92 S.Ct. at 2192 and 2193 (footnotes omitted).

Defendants argue that the delay in this case of seven years and seven months violates the Speedy Trial Clause as a matter of law. I decline to so rule, rather I examine this case in light of the four factors enunciated in *Barker*. I conclude that, in the circumstances of this case, the defendants' rights under the Speedy Trial Clause of the Sixth Amendment have been violated.

A. *Length of the delay*

The delay from indictment to the time this case will come to trial is seven years, six months, and 19 days. The government argues that I should exclude the period of six years and three months when this case was on appeal. The government notes that this time period would be excludable under the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(E). It cites a Fifth Circuit Court of Appeals opinion in support of its argument that the delay while the case was on interlocutory appeal should not be included in determining the length of delay for Speedy Trial Clause purposes. *United States v. Herman*, 576 F.2d 1139 (5th Cir. 1978). *Herman*, however, does not support the government's position. In *Herman*, the Fifth Circuit merely held that "[a]n interlocutory appeal by the

government is generally a valid reason that justifies an appropriate delay." *Id.* at 1146. The court noted that "delays to seek interlocutory appeals may not be justified in every case . . . ." *Id.* at 1147.

I follow the Fifth Circuit's analysis. I hold that the proper analysis is to include delay occasioned by interlocutory appeals in the computation of the length of the delay. The fact that the delay occurred because of interlocutory appeals can be accounted for when analyzing the reasons for the delay. This conclusion is in accord with Ninth Circuit precedent. *See United States v. Osuna-Sanchez*, 446 F.2d 566, 567 (9th Cir. 1971), *cert. denied*, 404 U.S. 1022, 92 S.Ct. 698, 30 L.Ed.2d 672 (1972) (six month delay justified).

The length of delay is a triggering device. *Barker*, *supra*, 407 U.S. at 530, 92 S.Ct. at 2192. There is no set amount of delay which is presumptively prejudicial; the length of delay necessary to invoke Speedy Trial Clause inquiry depends upon the peculiar circumstances of each case. *Id.* at 531, 92 S.Ct. at 2192. In this case, the ninety-one month delay between indictment and trial is sufficient to trigger scrutiny under the Sixth Amendment.

B. *Reasons for the Delay*

The government bears the burden of justifying the delay. *Barker*, *supra*, 407 U.S. at 531, 92 S.Ct. at 2192. The parties agree that a major portion of the delay in this case is due to the two interlocutory appeals. The government attempts to justify the delay incurred on the first appeal by noting the "complexity of the issues raised, the en banc hearing . . . , the necessity for a remand for an evidentiary hearing and the fact that defendants exhausted every possible

avenue on appeal." [8] These arguments, however, do not justify the length of the delay occasioned by the first appeal. The Ninth Circuit, *en banc*, held that the delay for interlocutory appeal of the explosives count could not be deemed unnecessary for purposes of Fed. R. Crim. P. 48(b). The Court, however, did hold that

> [the government's] appeal of the suppression order as it relates to the nondynamite counts was improper and delay in prosecution occasioned by this appeal has been unnecessary under Rule 48(b).

United States v. Loud Hawk, *supra*, 628 F.2d at 1150. Since the appeal was improper, the delay is not justifiable and weighs against the government. *See*, *Barker*, *supra*, 407 U.S. at 531, 92 S.Ct. at 2192; *United States v. Herman*, *supra*, 576 F.2d at 1146.

The government does not address the twenty-nine month delay occasioned by the second appeal. The length of this delay is troubling since this appeal, like the first appeal, was on an expedited basis. The length of the delay is also troubling because it comes on the heels of the four year delay occasioned by the first appeal. To state that the delay was the result of appellate review does not absolve the government of the duty under the Sixth Amendment to give these defendants a speedy trial. The federal government as a whole—executive, judicial, and legislative—is governed by the strictures of the Speedy Trial Clause. All three branches of government have a duty to in-

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[8] While the government asserts that the delay should be attributed to the defendants because "they exhausted every possible avenue on appeal," I note that it was the government which petitioned for rehearing *en banc*, not the defendants.

sure that rights of criminal defendants to speedy trials are not abrogated. *Dickey v. Florida*, 398 U.S. 30, 51, 90 S.Ct. 1564, 1575, 26 L.Ed.2d 26 (1970) (Brennan, J., concurring).[9] The twenty-nine month delay also weighs against the government, since "the ultimate responsibility for [delays occasioned by crowded courts] must rest with the government rather than the defendant." *Barker*, *supra*, 407 U.S. at 531, 92 S.Ct. at 2192. *See Brown v. Wolff*, 706 F.2d 902 at 906 (9th Cir. 1983) (crowded docket not good cause for continuance of Interstate Agreement on Detainers case).

The government argues that the time this case has been pending before this court—approximately fifteen months—must be attributed to the defendants. The government points to the "phrenetic motion practice" of the defendants' attorneys. The record does reflect that defendants have filed numerous pretrial motions. Nonetheless, of the motions filed, several were well taken and raised important issues. Furthermore, even if all the delay before this court is attributed to the defendants, there still exists the unjustified delay of six years and three months.

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[9] I note that during the first appeal in this case, the Ninth Circuit Court of Appeals was understaffed by thirteen judges. This understaffing necessarily led to delays and a backlog of cases on appeal. This backlog has been remedied by the appointment of thirteen new judges. Appeals before the Ninth Circuit are now current. While the delay in the two interlocutory appeals can be labeled the fault of Congress for not fully staffing the Ninth Circuit sooner, the delay must still weigh against the government. As Justice Brennan noted in *Dickey*, 398 U.S. at 52 n. 18, 90 S.Ct. at 1577 n. 18: "If the legislature were to refuse to install sufficient judicial machinery to perform judicial tasks, it might be necessary to turn some accused persons loose." (*Quoting King v. United States*, 265 F.2d 567, 569 (D.C. Cir. 1959)).

C. *Defendants' Assertion of Their Rights*

Defendants moved for dismissal of the indictment on the grounds of unnecessary delay as early as May 12, 1976. Upon remand after the first appeal, defendants moved for dismissal on the grounds of unnecessary delay and for denial of their Sixth Amendment right to a speedy trial. After the second appeal, defendants again moved to dismiss on the grounds of undue delay. Since the last remand, defendants have objected to every continuance of the trial date. I find that defendants have asserted their speedy trial rights. Their assertions of their rights "is entitled to strong evidentiary weight in determining whether the defendant[s are] being deprived of the right." *Barker*, *supra*, 407 U.S. at 531-32, 92 S.Ct. at 2192-93.

D. *Prejudice to the Defendants*

An affirmative showing of actual prejudice is not necessary to prove a Speedy Trial Clause violation. *Moore v. Arizona*, 414 U.S. 25, 26; 94 S.Ct. 188, 189, 38 L.Ed.2d 183 (1973); *United States v. Henry*, 615 F.2d 1223, 1232 n. 12 (9th Cir. 1980). The Supreme Court in *Barker* held that prejudice should be assessed in light of the interests the Speedy Trial Clause protects:

> This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired . . . . If witnesses die or disappear during a delay, the prejudice will be obvious. There is also prejudice if defense witnesses are unable to recall accurately events of

> the distant past. . . . Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.

Barker, supra, 407 U.S. at 532 and 533, 92 S.Ct. at 2193.

Defendants have made a sufficient showing of prejudice. It is true that defendants have not been incarcerated for the past seven years. Nonetheless, defendants Redner and Loud Hawk did spend eighty-seven days in custody and KaMook Banks spent ninety-nine days in custody. The record reflects that Dennis Banks was briefly in custody, but it does not reflect the length of his incarceration. Defendants concede that the length of time each of them has spent in custody is not excessive. Nonetheless, the length of time each defendant has lived with these unresolved criminal charges—over seven and one-half years—is excessive. The Supreme Court has consistently noted the substantial nature of this type of prejudice. *MacDonald, supra,* 456 U.S. at 8-9, 102 S.Ct. at 1502; *Barker, supra,* 407 U.S. at 533, 92 S.Ct. at 2193; *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971).

The defendants have also shown that the delay has impaired their ability to defend themselves. By affidavit they have shown that a number of defense witnesses have died. The affidavits of defendants' attorneys show that these witnesses would have testified favorably for the defendants.[10] Also, one of the original codefendants, Anna Mae Aquash, has also died.

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[10] The affidavit of S. Lynn Parkinson, attorney for defendant Redner, was submitted *in camera*. The government requested access to this affidavit in order to rebut the claim of actual prejudice. The affidavit records Redner's theory of the defense without setting forth any factual allegations which the government could refute. Therefore, at the request of the defendant, I did not reveal this affidavit to the government.

> While it is true . . . that the record does not indicate whether the testimony of this witness would have been helpful, or even available to the [defendants, I] cannot gainsay that it would not have been. Certainly the death of a witness with firsthand knowledge of the events at issue creates the strong possibility of prejudice to a defendant.

United States v. Macino, 486 F.2d 750, 754 (7th Cir. 1973). Defendants have also shown through the affidavit of their investigator that at least two witnesses have no independent recollection of the events of November 1975. Affidavit of Donald K. Grant.

I conclude that defendants have shown not only the possibility of prejudice stemming from the delay, they have established actual prejudice which is "definite and not speculative." *Arnold v. McCarthy,* 566 F.2d 1377, 1384 (9th Cir. 1978). As such, defendants' proof of prejudice even meets the more stringent requirements under the Due Process Clause analysis.

III. *Conclusion*

In light of the above, I find that the four *Barker* factors, when weighed together, compel the conclusion that these defendants' Sixth Amendment right to a speedy trial has been violated. The extreme length of the delay coupled with the actual prejudice shown and the lack of any articulated justifiable reason for the delay mandate that the indictment against

these defendants be dismissed. I note that this case, like all Speedy Trial Clause cases, is *sui generis* and my decision rests on the peculiar circumstances of this case. As indicated earlier, the government insists that most of the delay in this case must be examined under the Due Process Clause which requires a finding of definite and not speculative prejudice. Although I disagree with the government that the Due Process test applies, even when the delay is so tested I conclude that dismissal is proper. The indictment is dismissed with prejudice as to all defendants.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CR No. 75-296

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS and DARLENE PEARL NICHOLS, also known as Kamook Banks, DEFENDANTS.

[Filed Aug. 12, 1980]

AMENDED ORDER

Page 1-2, 3, lines 1-22 of the Order dated August 8, 1980 is amended as follows:

MOTION TO DISMISS FOR VINDICTIVE PROSECUTION

A defendant has the initial burden to show a "mere appearance of vindictiveness." *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980). Once this showing has been made, the burden shifts to the Government to show that its decision was "justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness." *Id.*

While I conclude there is no evidence that the Government's action was vindictive *in fact*, the Government has failed to dispel the *appearance* of vindictiveness as to KaMook Banks.

A mere appearance of vindictiveness is a very strict standard to overcome. *Griffin, supra*, 617 F.2d at 1346. It is not necessary, nor did I find, that the Government acted with a malicious or retaliatory motive. *Id.* There is also no evidence in the record that the prosecutors took this action because of any personal bias or animosity toward any of the defendants or their attorneys.

After the mandate was returned from the Ninth Circuit, the Government contended that there was "no justifiable purpose" served in refusing to reinstate the non-dynamite counts; the Government was content to proceed under the 1975 Indictment. At that time, the Government knew that KaMook Banks was under indictment for a crime punishable by imprisonment for a term exceeding one year in the United States District Court for the District of Kansas.

The Defendants contended that the counts should not be reinstated; if the Government was to proceed, the Grand Jury should be asked to reindict.

After hearing argument on this issue, this court refused to reinstate the counts.

The Government then submitted the evidence to the Grand Jury, and on June 17, 1980, a superseding Indictment was returned. Count VII charged KaMook Banks with receipt of firearms while under indictment for a crime punishable by imprisonment for a term exceeding one year. This crime was not charged in the earlier indictment.

I find that as to KaMook Banks, defendants have made a prima facie showing, and the Government has failed to dispel the appearance of vindictiveness.

The Government, at the time it requested reinstatement of the counts, knew that KaMook Banks was under indictment in the District of Kansas; it also knew that the crime she was charged with was punishable by imprisonment for a term exceeding one year. The Government, however, did not submit this information to a Grand Jury. Rather, it was willing to proceed on the 1975 Indictment.

It was only after defendants opposed reinstatement, and the court ordered reindictment, that the Government submitted the evidence to the Grand Jury, and KaMook Banks was indicted for the additional charge.

The Government's evidence was not sufficient to dispel the appearance of vindictiveness. It merely contended that it was only after June 10, 1980, that the Government learned KaMook Banks was charged with a violation of 18 U.S.C. § 922(g) (interstate transportation of firearms by a person under indictment). However, the fact that the Government did not know the precise charge that KaMook Banks was indicted for its irrelevant. It did know, as early as 1976, that KaMook Banks was under indictment for a crime punishable by imprisonment for a term greater than one year. That information was sufficient to charge her with a violation of 18 U.S.C. § 922(h) then. There were no independent reasons or intervening circumstances which dispelled the appearance of vindictiveness.

Defendants Dennis Banks, Loud Hawk and Redner allege that the Government added additional charges, additional counts and an additional destructive de-

vice to the 1980 Indictment. They allege that the reason for these new charges, counts and devices is prosecutorial vindictiveness. I disagree.

The prosecutor has wide discretion in choosing which charges to bring against a particular defendant. *Griffin, supra,* 617 F.2d at 1346.

After this court ordered the Government to resubmit the non-dynamite counts to the Grand Jury, the prosecutors reviewed the legal and factual background for each of the charges in the 1975 Indictment. The prosecutors also reviewed the physical evidence.

After this review of the facts, the law and the physical evidence, and after discussions with an explosive expert and the FBI, the Government decided to drop some counts from the 1975 Indictment and add new charges to the 1980 Indictment.

The decision of the Government to drop certain charges and add new charges was an objective decision based upon an analysis of the facts. It was a product of independent judgment of subsequent prosecutors. *Hardwick v. Doolittle,* 558 F.2d 292, 301 (5th Cir. 1977), *cert. denied,* 434 U.S. 1049 (1978); *United States v. Ricard,* 563 F.2d 45, 48 (2nd Cir. 1977), *cert. denied,* 435 U.S. 916 (1978).

I, therefore, find that as to defendants Dennis Banks, Loud Hawk and Redner, the Government's decision was justified by independent reasons and intervening circumstances which dispel the appearance of vindictiveness. *Griffin, supra,* 617 F.2d at 1347.

In summary, while I conclude there is no evidence that the Government's action was vindictive *in fact,* the Government has failed to dispel the *appearance* of vindictiveness as to KaMook Banks. The motion to

dismiss is denied except as to defendant KaMook Banks.

Dated this 12th day of August, 1980.

/s/ James A. Redden
JAMES A. REDDEN
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CR No. 75-296

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS and DARLENE PEARL NICHOLS, also known as Kamook Banks, DEFENDANTS.

[Filed Aug. 8, 1980]

ORDER

MOTION TO DISMISS FOR VINDICTIVE PROSECUTION

A defendant has the initial burden to show a "mere appearance of vindictiveness." *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980). Once this showing has been made, the burden shifts to the Government to show that its decision was "justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness." *Id.*

While I conclude there is no evidence that the Government's action was vindictive *in fact*, the Govern-

ment has failed to dispel the *appearance* of vindictiveness as to KaMook Banks.

A mere appearance of vindictiveness is a very strict standard to overcome. *Griffin, supra*, 617 F.2d at 1346. It is not necessary, nor did I find, that the Government acted with a malicious or retaliatory motive. *Id.* There is also no evidence in the record that the prosecutors took this action because of any personal bias or animosity toward any of the defendants or their attorneys.

After the mandate was returned from the Ninth Circuit, the Government contended that there was "no justifiable purpose" served in refusing to reinstate the non-dynamite counts; the Government was content to proceed under the 1975 Indictment. At that time, the Government knew that KaMook Banks was under indictment for a crime punishable by imprisonment for a term exceeding one year in the United States District Court for the District of Kansas.

The Defendants contended that the counts should not be reinstated; if the Government was to proceed, the Grand Jury should be asked to reindict.

After hearing argument on this issue, this court refused to reinstate the counts.

The Government then submitted the evidence to the Grand Jury, and on June 17, 1980, a superseding Indictment was returned. Count VII charged KaMook Banks with receipt of firearms while under indictment for a crime punishable by imprisonment for a term exceeding one year. This crime was not charged in the earlier indictment.

I find that as to KaMook Banks, defendants have made a prima facie showing, and the Government has failed to dispel the appearance of vindictiveness.

The Government, at the time it requested reinstatement of the counts, knew that KaMook Banks was under indictment in the District of Kansas; it also knew that the crime she was charged with was punishable by imprisonment for a term exceeding one year. The Government, however, did not submit this information to a Grand Jury. Rather, it was willing to proceed on the 1975 Indictment.

It was only after defendants opposed reinstatement, and the court ordered reindictment, that the Government submitted the evidence to the Grand Jury, and KaMook Banks was indicted for the additional charge.

The Government's evidence was not sufficient to dispel the appearance of vindictiveness. It merely contended that it was only after June 10, 1980, that the Government learned KaMook Banks was charged with a violation of 18 U.S.C. § 922(g) (interstate transportation of firearms by a person under indictment). However, the fact that the Government did not know the precise charge that KaMook Banks was indicted for is irrelevant. It did know, as early as 1976, that KaMook Banks was under indictment for a crime punishable by imprisonment for a term greater than one year. That information was sufficient to charge her with a violation of 18 U.S.C. § 922(h) then. There were no independent reasons or intervening circumstances which dispelled the appearance of vindictiveness.

In summary, while I conclude there is no evidence that the Government's action was vindictive *in fact*, the Government has failed to dispel the *appearance* of vindictiveness as to KaMook Banks. The motion to dismiss is denied except as to defendant KaMook Banks.

MOTION TO DISMISS FOR PRE-INDICTMENT DELAY

The motion is denied.

Defendants have not demonstrated that the pre-indictment delay violated the Due Process Clause. *United States v. Lovasco*, 431 U.S. 783 (1977); *Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978). There was also no showing of a violation of the Sixth Amendment. *Barker v. Wingo*, 407 U.S. 514 (1971); *Arnold, supra.*

SECOND MOTION IN LIMINE

The motion as to defendant Dennis Banks is denied. Fed. R. Evid. 403; *United States v. Peltier*, 585 F.2d 314, 321 (9th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979). Because of my ruling on the motion to dismiss, this motion as to KaMook Banks is moot.

The motion as to evidence relating to the search for and attempt to arrest defendants Banks and Peltier is granted in part. The Government may only introduce evidence of events which occurred at the scene of the alleged crime.

MOTION TO DISMISS COUNTS III AND IV FOR INSUFFICIENT ALLEGATIONS

The motion is denied. *United States v. Loud Hawk*, Nos. 76-1906, 76-2127 (9th Cir. August 7, 1979); *United States v. Oba*, 448 F.2d 892 (9th Cir. 1971).

MOTION TO SUPPRESS PHOTOGRAPHIC IDENTIFICATION AND POTENTIAL TAINTED COURTROOM IDENTIFICATION

The motion is denied.

First, the motion was not timely filed. Fed. R. Crim. P. 12(c). The basis for this motion was known to defendants for at least 5 years.

Second, even assuming that the motion was timely filed, co-defendants do not have standing to suppress the identification of Peltier. *See United States v. Cella*, 568 F.2d 1266, 1280-82 (9th Cir. 1978). Only those persons who have been directly and personally affected by the actions of law enforcement officers have standing to challenge those actions. *Rakus v. Illinois*, 439 U.S. 128 (1978). Although *Rakus* involved standing under the Fourth Amendment, its principles are equally applicable here.

Finally, assuming that the motion was timely filed and defendants have standing, there was no showing that the use of the photographs may lead to "a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Manson v. Brathwaite*, 432 U.S. 98, 111-16 (1977).

MOTION FOR APPOINTMENT OF INVESTIGATOR AT GOVERNMENT EXPENSE

The motion is denied. Defendants have failed to show sufficient need for the appointment of an investigator. *Smith v. Enomoto*, 615 F.2d 1251 (9th Cir. 1980).

Dated this 8th day of August, 1980.

/s/ James A. Redden
JAMES A. REDDEN
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CR 75-296

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MOSES LOUD HAWK,
RUSS JAMES REDNER, ET AL., DEFENDANTS.

Portland, Oregon
May 12, 1976

TRANSCRIPT OF MOTION TO DISMISS

BEFORE:

The Honorable Robert C. Belloni, Chief Judge.

APPEARANCES:

Messrs. Sidney I. Lezak, United States Attorney, William W. Youngman and Charles H. Turner, Assistant United States Attorneys, appearing in behalf of the Government;

Messrs. Edward Jones and Ronald Schiffman, co-counsel for the defendant Loud Hawk;

Ms. Shelia Lea and Messrs. Lewis Gerwitz and Thomas Steenson, counsel for the defendant Redner;

Mr. Dennis Roberts, counsel for the defendant Dennis Banks;

Mr. Michael T. Bailey, counsel for the defendant Ka-Mook Banks.

(Wednesday, May 12, 1976, 9:30 o'clock a.m., Court convened and the following proceedings took place:)

THE COURT: This is the time set for the trial of United States of America versus Kenneth Moses Loud Hawk, Russ James Redner, Dennis James Banks, and Ka-Mook Banks. Are you ready for the Government?

MR. LEZAK: No, Your Honor, for the reasons stated in the memorandum filed with this Court yesterday, we are not.

* * * * *

THE COURT: All right. Well, I think everyone here realizes that this case will be dismissed against these defendants. Both this Court and the Court of Appeals has denied any postponement.

I am ready to try the case commencing today. Both parties have had ample time to prepare. The defendants are ready to go to trial. For some reason, which I do not understand, the Government is not, even though two of the counts are not even concerned with the subject of previously suppressed evidence. I do not want to dismiss this case without a trial. The factual and legal dispute should be heard and decided, but there is no way the Court can force the Government to call its witnesses. My only recourse is to dismiss the case against these four defendants.

Clearly, there has been unnecessary delay in bringing these four defendants to trial. Clearly, it's the fault of the Government.

The case—the indictment as to the four mentioned defendants is dismissed. All Court-imposed restrictions upon the activities of Mr. Loud Hawk, Mr. Redner, and Ka-Mook Banks are now removed. The bondsmen for all defendants are exonerated. The cash posted by Mr. Banks will be returned to him.

* * * * *

THE COURT: The exact nature of the dismissal is—it gives me some problems. There simply is not much law on the nature of this dismissal. But it does seem to me that there should be no further proceedings based upon the alleged occurrence stated in this indictment unless the Court of Appeals for the Ninth Circuit decides that my order to suppress was erroneous and remands the case to this Court for trial.

Inasmuch as I have power to do so, this dismissal of the indictment is with prejudice, unless the Ninth Circuit decides otherwise and remands the case or some part of it for trial.

* * * * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Criminal No. 75-296

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MOSES LOUD HAWK,
RUSS JAMES REDNER, ET AL., DEFENDANTS.

[Filed Mar. 31, 1976]

ORDER SUPPRESSING EVIDENCE

FACTS (for the purposes of this motion only)

The defendants were arrested at approximately 10:00 p.m. November 14, 1975, near Ontario, Oregon following the stop of a station wagon and a motor home in which they were traveling. In the afternoon of November 15, pursuant to search warrants obtained subsequent to the arrests, Oregon State Police officers discovered what appeared to be seven cases of Dupont Gelex 2-70% dynamite in the rear of the station wagon. That same evening, Lt. McCullum, an Oregon State Police officer, notified Officer William Fettig, an Oregon State Police bomb expert, and

directed him to proceed to Ontario and dispose of the dynamite.

Officer Fettig arrived in Ontario in the afternoon of November 16. He found the station wagon located in a commercial towing garage where it had been placed sometime between the time of the arrests and his arrival. Officer Fettig transferred the dynamite and other explosives components including electrical wiring and blasting caps into the trunk of his car. He placed these materials on blankets and drove them to a pistol range about 5 miles from Ontario.

Once at the pistol range, Officer Fettig removed wrappers from two sticks of dynamite in each of the seven cases. He scraped off as much residue from the wrappers as he could and handed them over to an agent of the FBI. He then detonated a total of four sticks of dynamite. Following these detonations, he burned the remaining dynamite as well as the cardboard boxes and plastic bags in which the dynamite had been contained. After the burned residue had cooled, the Oregon State Highway Department, at Officer Fettig's request, performed clean-up operations.

From the time of Officer Fettig's arrival in Ontario to the burning of the dynamite, FBI and Oregon State Police photographers were taking still pictures of each step of the above proceedings. At no time were any of the defendants or their representatives or any neutral persons such as members of the press either present at or informed of the sequence of events outlined above until after they had already occurred.

The defendants have moved to suppress any and all evidence relating to the destroyed dynamite. They contend that the destruction of this evidence consti-

tutes a denial of due process in that no opportunity for defense analysis of the substance is now possible and the destruction was carried out before the defendants had any chance to object or suggest alternatives.

The government argues that: the dynamite, manufactured in 1973, could have been as much as three years old; two of the cardboard boxes of dynamite were water-soaked; and no one could be sure of what conditions this dynamite had been subjected to in those three years. Under these conditions, the government argues that it was reasonable to destroy this dangerous explosive in order to preserve the public safety.

The following are some of the factors on which I now base my decision on this motion.

FACTORS

Dynamite, in any form, is a dangerous substance that should only be handled and stored by experts. Explosives of any type should be disposed of when they become so unstable or sensitive as to be unpredictable in their detonation characteristics. Disposal of explosives in this condition is in the public interest and that factor would weigh heavily against any claim of prejudice by the destruction.

The destruction in this case occurred without notice to or presence of the defendants or their representatives or any neutral persons. All those present were law enforcement officers. The destruction took place before defendants were appointed counsel. The dynamite had been stored for nearly two full days before its destruction. There has been no evidence presented to me showing why it could not have been

stored until defense counsel could have been appointed or retained.

The Oregon State Police did not have adequate facilities in which to store this dynamite. The uncontradicted testimony is, however, that commercial storage magazines are located in Baker and Pendleton, Oregon and Boise, Idaho in which this dynamite could have been stored. Baker is only about 60 miles from Ontario. Experts for both the defendants and the government agree that there existed no reason why the dynamite could not have been transported and stored in one of these magazines with relative safety.

Officer Fettig destroyed the dynamite pursuant to instructions from his superior, Lt. McCullum. Lt. McCullum was not in court to testify as to his reasons for such instructions. Without such testimony, the only evidence presented was that the dynamite was no more dangerous or sensitive than "normal" dynamite and that the water-soaked sticks were less sensitive, if anything, than "normal" dynamite.

The boxes and plastic bags which contained the dynamite were also destroyed. The Oregon State Police, while attempting to take fingerprints from the outside of the station wagon, did not do the same with either the cardboard boxes or the plastic bags. Two of the defendants, Dennis Banks and Ka-Mook Banks, were not traveling in the vehicle in which the dynamite was found although they are charged with its possession. The destruction of these articles eliminated the possibility that they could have presented evidence rebutting this charge: i.e. they might have been able to show that their fingerprints were not on the dynamite containers.

CONCLUSION

Balancing the possible prejudice to the defendants against the government's reasons for the destruction, I must find in favor of the defendants. Because of this destruction, it is impossible for the defendants to show that they have been prejudiced but neither can the possibility of such prejudice be rebutted. In this situation, a presumption of such prejudice is created. This presumption, however, can be outweighed by valid reasons for the kind of destruction that took place here.

On several occasions, this Circuit has warned law enforcement officers against the intentional and negligent destruction of evidence. Apparently, these warnings have gone unheeded.[1] The officers and agents

[1] In *United States v. Heiden*, 508 F.2d 898 (9th Cir. 1974), officers had destroyed contraband following their customary practice but kept a representative sample. Judge Wallace, for the Court, wrote in footnote 1, page 903:

> The government is flirting with danger of reversal any time evidence is lost or inadvertantly destroyed. When evidence is seized, the government should take every reasonable precaution to preserve it. Saving only 24 kilo bricks from large marijuana seizures is, under ordinary circumstances, neither unreasonable nor illogical. Procedures should be instituted, however, that will prevent the type of destruction of evidence as occurred in this case.
>
> * * *

Judge Merrill, with the concurrence of Judge Peckham, then wrote:

> I concur in Judge Wallace's opinion but wish to lend emphasis to his warning in footnote 1. Cases will arise where the contraband destroyed does have potential usefulness as evidence not possessed by the sample retained. When this occurs and destruction is shown to have been prejudicial, reversal is called for. I would say that the practice apparently followed in the Southern District invites reversal. I would urge that it be halted; that destruction of evidence follow only after petition and order directed to the particular items to be destroyed with notice to the defendant and opportunity to petition for access to that which has been seized.

In that case, at least a sample of the contraband was preserved. Here, none was saved. Even the wrappers were scraped clean.

who were present at and who conducted the destruction of the dynamite and its containers were experienced personnel. They must have known how sensitive this case would become and how material this evidence was to the case. There was no evidence that the destruction in this case was in bad faith, but lack of bad faith does not give the government a license to destroy evidence without some accountability. It was the government who caused the presumption of prejudice in this case. Without a showing of some reasoning behind the government's conduct, that presumption has not been rebutted.

Defendants' Motion to Suppress all evidence, tangible and intangible, relating to the Dupont 70% dynamite is granted.

Dated this 30th day of March, 1976.

/s/ Robert C. Belloni
United States District Judge

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3067

DC CV 75-296 JAR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, aka KAMOOK BANKS, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Portland District of Oregon

[Filed Jan. 18, 1985]

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the PORTLAND District of OREGON and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the

judgment of the said District Court in this Cause be, and hereby is affirmed.

Jan. 16, 1985

A TRUE COPY
ATTEST

PHILLIP B. WINBERRY
Clerk of Court

by /s/ Joseph Williams
Deputy Clerk

Filed and entered August 30, 1984

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT COURT

No. 83-3067

UNITED STATES OF AMERICA, APPELLANT

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, A/K/A KAMOOK BANKS, APPELLEES

[Filed Jan. 8, 1985]

ORDER

BEFORE: WALLACE AND CANBY, CIRCUIT JUDGES AND CRAIG*, DISTRICT JUDGE

A majority of the panel as constituted above has voted to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Walter Early Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

APPENDIX L

CHRONOLOGY OF PROCEEDINGS

11/14/75	Respondents apprehended (D. Banks arrested 1/26/76)
12/22/75	Superseding indictment returned
3/31/76	Suppression motion granted (Gov't appeals)
5/12/76	Indictment dismissed (Gov't appeals)
10/15/76	Appeal argued and submitted
7/26/77	Court of appeals (panel) affirms
10/17/77	Rehearing en banc granted
3/6/78	Limited remand
8/23/78	District court issues findings of fact
8/7/79	Court of appeals (en banc) reverses and remands
10/1/79	Respondents' rehearing petition denied
3/3/80	Respondents' certiorari petition denied (Mandate issued 3/12/80)
5/12/80	District court orders new indictment
6/18/80	Superseding indictment returned
8/8/80	Indictment dismissed (KaMook Banks only) (Other respondents and gov't appeal)
1/7/81	Appeals argued and submitted
7/29/82	Court of appeals reverses as to KaMook Banks and dismisses as to the other respondents
10/5/82	Respondents' rehearing petition denied
1/10/83	Respondents' certiorari petition denied (Mandate issued 1/31/83)
5/20/83	Indictment dismissed for violation of Speedy Trial Clause (Gov't appeals)
1/4/84	Appeal argued and submitted
8/30/84	Court of appeals affirms
1/8/85	Government's rehearing petition denied

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10158

Office - Supreme Court, U.S.
FILED
MAR 25 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1361

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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87-A-

QUESTIONS PRESENTED

1. Whether the Sixth Amendment's Speedy Trial Clause protects a defendant who is an appellee in an on-going pre-trial appeal filed by the Government as part of its effort to try, convict and incarcerate him or her.

2. Whether a per se rule should be adopted allowing pre-trial criminal appeals to consume a limitless amount of time, thereby insuring that even clearly inappropriate appellate delay cannot impact a defendant's right to a speedy trial.

3. Whether every time a suppression order is entered against the Government with respect to only one part of a criminal case, the Government can contumaciously refuse to proceed to trial on the uneffected counts after being denied a stay by both the trial and appellate benches, and suffer no consequence under Barker v. Wingo for such recalcitrance.

4. Whether the appellate court erred in upholding the the District Court's use of discretion in sustaining a speedy trial violation by applying the analysis of Barker v. Wingo to the unique facts of this decade old case.

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No. 84-1361

IN THE

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October Term, 1984

UNITED STATES OF AMERICA, PETITIONER ·

v.

KENNETH MOSES LOUD HAWK, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondent Dennis James Banks, on his own behalf as well as on the behalf of Respondents Kenneth Moses Loud Hawk, KaMook Banks and Russ James Redner, respectfully moves that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case.

OPINION BELOW

The opinion below is reported at 741 F.2d 1184.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1). The judgement of the Court of Appeals was issued on August 30, 1984, and a petition for rehearing was denied on January 8, 1985. (The mandate issued January 16, 1985.)

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

This criminal case began on November 14, 1975. Despite continuous proceedings over the last ten years, it has yet to go to trial.

On November 13, 1975 the FBI issued a teletype describing two vehicles in which it believed federal fugitives were traveling. The next day a motor home matching the description was stopped in the eastern Oregon town of Ontario by Oregon State Trooper Griffiths. It contained Respondent KaMook Banks, former co-defendants Anna Mae Aquash and Leonard Peltier[1], and at least one other unknown person.

The Trooper approached the motor home, and asked all the occupants to step outside. Respondent KaMook Banks, her infant child, and Peltier and Aquash emerged. In answer to his inquiry, Griffiths was told that no one was inside. At that same instant the vehicle sped forward, and Peltier escaped over a fence. The vehicle was found a half mile down the highway with no one inside.

A subsequent search pursuant to state and federal search warrants revealed blasting caps, pocket watches, and eight firearms which allegedly had their serial number obliterated.

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[1]Leonard Peltier's case was severed from Respondents', and subsequently dismissed on motion of Petitioner.

Anna Mae Aquash died under mysterious and still unresolved circumstances in South Dakota. The FBI interceded when her body was found, and an autopsy was conducted at its direction (during which her hands were severed and sent to Washington). The cause of death was given as "exposure," and she was quickly buried under unusual procedures. The testimony of hospital staff revealed that thawing blood had been seen dripping from a clear hole in her head. An independant pathologist performed an autopsy on the exhumed body, and found that she had been executed at close range. (CR 132)

All items were secreted in various parts of the vehicle.[2,3]

As Trooper Griffiths stopped the motor home, a station wagon containing Respondents Kenneth Moses Loud Hawk and Russ James Redner pulled off the highway and stopped on the shoulder a distance back from the motor home. They too were arrested. A search of their vehicle pursuant to the same warrants produced a quantity of a substance which the Government contends was dynamite, and which was subsequently destroyed by state officials despite the fact that it could easily have been stored in nearby magazines. The destruction was carried out with the knowledge of, and in the presence of, federal agents. Although they could have easily preserved the evidence, they chose not to do so.[4,5]

---

[2]See: CR-R-160. (Note: Between the time of the Government's first appeal and the first remand the District Court adopted a new numbering system. In effect, the numbering of documents was begun anew, with an "R" preceeding the document number. However, some documents from the mid 1970s are near unfindable because of the confusion, and are more easily referenced by using the old system that gave each page a separate number. These documents will be referred to by the notation "FCR" for "former" clerk's record.)

[3]Petitioner's theory is that Dennis Banks was the driver of the motor home. It bases this conclusion on the fact that his wife was in the motor home, as was his briefcase, and that a few fingerprints alleged to be his were found on such items as pickle jars. The Government does not allege that his fingerprints were found on any of the items charged in the indictment, or on any other items that would indicate a "recent" presence in the motor home.

In fact, Petitioner did not provide Respondents with crucial reports that showed that other peoples' fingerprints were found in the motor home, or other reports that evidenced police "throw downs" in which people other than Dennis Banks were identified as travelling in the motor home in November, 1975 along I-80N (now I-84). (These reports were received from other defense counsel on other unrelated cases and forwarded to Respondents). See: CR-R-160, RT 6/17/80 pps. 115-116, CR-R-242, CR-R-216, RT 3/9/83 pps. 30, 48-49.

[4] Petitioner alleges that "Oregon state law enforcement officers removed the dynamite and destroyed it without consulting federal officials." Pet. for Cert at 4. The FBI agent present at the execution of the state search warrant for the vehicles instructed a state officer to stop his search of the motor home and start searching the station wagon. (RT 5/9/78 pps. 211-212). The officer followed this order and thereupon found the substance alleged to be dynamite. It was not until the next afternoon (during which time at least a dozen FBI agents were in the area) that the evidence was removed. (RT 3/22/76 p. 9, RT 5/9/78 pps. 167-168) FBI agents were present during the removal of the alleged dynamite and its

All respondents were indicted on November 25, 1975 and charged with possessing explosives and firearms. Trial was set for the week of February 9, 1976 (CR 6).

A superceding indictment was returned on December 22, 1975. Two days later Respondents filed their motion to suppress based on the destruction of the alleged dynamite, as well as on the destruction of the cardboard boxes and plastic bags that the destroyed evidence was contained in. No fingerprint analysis had been conducted. (CR 17)

On January 21, 1976 the trial date was continued for one month on motion of Respondents Redner and Loud Hawk to March 8, 1976. The paramount reason for the continuance was problems with defense investigation.[6]

On January 23, 1976 defendants Dennis Banks' case was severed from that of the other Respondents. However, three days later he was arrested in California. Given this change of circumstances, all parties, including the Government, felt that

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[4](continued) transportation to a gravel pit for destruction. The agents photographed the process and were present at the destruction. (RT 3/22/76, p. 50). Surviving wrappers from the alleged dynamite were handed to FBI agents on the scene. (RT 3/22/76 p. 51). Prior to the destruction the FBI agent in charge of all Bureau activities in Oregon arrived in the area. He was aware of the existence of the dynamite, and that it was potential evidence in a federal prosecution. He was also aware that an attorney named Beverly Axelrod was present in Ontario, Oregon, representing Respondents, and made no effort to contact her about the destruction. (RT 5/9/78 pps. 166, 167, 169, 172.)

Based on these facts Judge Belloni found that the evidence was "on a conveyer belt to be destroyed. And one word by a member of the FBI would have stopped that conveyer belt." (RT 5/9/78 p. 122)

[5]The only surviving evidence were wrappers which contained not even a trace of explosive material, and photographs. The pictures depicted two proported detonations of sticks of the alleged dynamite connected to state police supplied primer cord and blasting caps. Analysis of the photographs showed that the detonation was inconsistent with that of dynamite, and consistent with that of primer cord and blasting cap alone. RT 3/19/76, RT 5/9-10/78, CR-R-26. App. 37a-40a.

[6]The basis of the investigative difficulties (which have not been cured to this date) became clear at a hearing in March, 1976: The United States Attorney's Office had instructed all "its" witnesses to refrain from talking with anyone associated with the defense. (RT 3/22/76, pps. 78, 83-90)

one joint trial with Mr. Banks would be preferable, even if the March 8 trial date was unrealistic. (RT 2/5/76, pps. 42-48). On February 18, 1976, the trial date was reset to May 12, 1976 in order that all defendants could be tried together. (CR-62) The Government did not object to a joint trial on that date, but rather objected because it was misinformed and did not believe that Mr. Banks would waive removal and be available for trial in May.[7] (FCR 994, 1004)

Despite opposition from the Government, Respondents KaMook Banks, Redner and Loud Hawk were finally released from custody.[8] Within a matter of days of their release, all Respondents were designated "high risk" pursuant to 18 USC §3164 and Section 12(b) of the local plan for Prompt Disposition of Criminal Cases (CR 63). The Government has never moved the Court to rescind that prejudicial appellation.

An evidentiary hearing on Respondents' suppression motion was held on March 19 and 22, 1976. Judge Belloni granted the motion on March 31, 1976, and suppressed "all evidence, tangible and intangible, relating to" alleged dynamite. (App. 157a)

The Government filed a notice of appeal from the suppression order on April 19, 1976 and asked the District Court for a continuance of the trial date, which was denied. (CR 115, CR 120). The Government made a similar request to the Ninth Circuit Court of Appeals on April 23, 1976. Respondents filed an opposition to that request, demanding observance of

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[7]Problems caused by the Government's blockade of defense investigation were also given as a reason for the continuance. (CR 64)

[8]KaMook Banks was released on a stringent third-party recognizance on February 5, 1976, shortly after she had given birth in custody (to Iron-Door-Woman).

Russ Redner and Kenneth Loud Hawk were released with similar restrictions on February 9, 1976.

Redner and Loud Hawk had moved for release as early an November 20, 1975 (CR 3); KaMook Banks did likewise on December 22, 1975 (CR 11). These three respondents made repeated demands for pre-trial release and for contact visits. (CR 3, CR 8, CR 9, CR 10, CR 11, CR 20, FCR 364, CR 45, RT 11/20/75, RT 12/23/75, RT 1/23/76, RT 2/2/76, RT 2/5/76). After their release they had to make repeated demands to the Court for permission to travel. (CR 65, CR 66, CR 67, CR 89, CR 90, CR 119, CR 123, RT 3/3/76, RT 4/29/75)

their right to a speedy trial. (FCR 1086, Respondents' App. 1a-8a). The request for stay was denied.

At an April 29, 1976 hearing, the Government stated that it "could not proceed without [the suppressed evidence]," despite the fact that the suppressed evidence had nothing to do with the gun counts. (RT 4/29/76, p.5) Respondents again insisted on their desire to proceed to trial on May 12. (RT 4/29/76, p. 12, CR 127)

On May 4, 1976 the Government again asked the District Court for a continuance. In that request the Government conceded that Respondents "desire the case to be tried at the earliest practicable opportunity." (CR 136)

On May 11, 1976 the Government filed a response to a Brady[9] motion in which it admitted that it was willing to suffer a dismissal with prejudice for refusing to proceed to trial.[10]

On May 12, 1976 the case was called for trial. All Respondents were ready:

> MR. ROBERTS:
>
> Our defendants' rights under the Speedy Trial Act as well as the Constitution of the United States are being flagrantly violated by the dilatory tactics of the Government in this case.
>
> We are ready for trial. We demand our trial; we demand our day in court now. We want our total and full exoneration by a jury. This is the day set by the Court many months ago for trial. We are ready and need our trial today.

(RT 5/12/76, p.4)

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[9] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963)

[10] "It hardly makes sense that defendants can be heard to complain under Brady about being in possession of materials which they may consider exculpatory [fingerprint analysis of the vehicles showing prints of people other than Respondents] made available by the United States Government [to attorneys in another case, who provided the material to counsel for Respondents] some twenty-two (22) days before the present trial date and what in light of the upcoming dismissal could prove to be a matter of months before a trial of this case, if indeed there is a trial of this case at all." (CR 140) [emphasis added]

The Government refused to proceed. Judge Belloni dismissed the case with prejudice, saying:

> I am ready to try the case commencing today. Both parties have had ample time to prepare. The defendants are ready to go to trial. For some reason, which I do not understand, the Government is not, even though two of the counts are not even concerned with the subject of previously suppressed evidence. I do not want to dismiss this case without a trial. The factual and legal dispute should be heard and decided, but there is no way the Court can force the Government to call its witnesses. My only recourse is to dismiss the case against these four defendants.
>
> Clearly, there has been unnecessary delay in bringing these four defendants to trial. Clearly, it's the fault of the Government.

During that hearing the Government expressed its desire that the Court impose release restrictions on Respondents. (RT 5/12/76, pps. 6-8. 9-10)

Additionally, the Government admitted that it did not need the suppressed evidence to go forward with the trial on the unrelated counts. (RT 5/12/76, pps. 12-16). The Government filed its notice of appeal from the dismissal in open court. (CR 142; RT 5/12/76, p. 12; App. 122a-123a, fn.2) The appeals were consolidated and "expedited" under Court rules. (App. 123a)

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The consolidated appeals were argued and submitted on October 15, 1976. (App. 123a). A divided panel affirmed on July 26, 1977. (id. at 88a-118a) The Government's petition for rehearing en banc, filed on September 7, 1977, was granted on October 17, 1977. (id. at 123a) On March 6, 1978 the Court of Appeals (without giving up jurisdiction of the case) remanded to the District Court in order that an evidentiary hearing be held. Judge Belloni held that hearing on May 9 and 10, 1978. On June 16, 1978, the government's motion for an extension of time until July 14, 1978 for filing its proposed findings of fact was granted. (id. at 123a) The Findings of Fact were issued on August 23, 1978.

The en banc court issued its opinion on August 7, 1979 (id. at 36a-87a), reversing the suppression order and reinstating the dynamite counts.[11] The Court found that the Government's refusal to proceed to trial on the non-dynamite counts constituted unnecessary delay. However, although it found dismissal was entirely proper, it reversed the "with prejudice" aspect. Although the Government knew it was going to suffer a dismissal, the Court held that forewarning of the dismissal sanction must come from the Court to the Government, rather than the other way around. (id., at 61a)

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[11]Two stinging dissents accompanied the dismissal. Judge Hufstedler wrote that "all appellate inquiry should end with 'affirmed'. . . That result is unsatisfactory to the majority, and therefore, it is required to exolain why the fact of prejudice is nevertheless not prejudice justifying suppression." (id., at 75a-76a)

Judge Ely wrote: "Not only does the majority disregard the critical determinations of the district judge, but also it holds that the judge was clearly wrong in making a determination based upon conflicting testimony. In sum, the majority now does no more in affirming the convictions (sic) that (sic) it might have done upon the record before us in the original en banc proceedings. In fact it does less, for it accords absolutely no weight or deference to the careful review of the district judge upon remand and the guidance with which the district judge has now favored us, and which, in the first en banc disposition, the majority wrote that it wanted. I do not asperse the good faith or the motives of any of my colleagues. All of them know that I hold each in the highest esteem. Notwithstanding, I record my belief that the proceedings in this appeal, with two hearings before the full court, and all the deliberations that followed, reflect a futile exercise. (Id., 86a-87a)

Respondents' Petition for rehearing with suggestion for rehearing en banc was denied October 1, 1979; their Petition for Certiorari was likewise denied March 3, 1980. The Mandate was received in the District Court on March 20, 1980. (CR-R-30)

Following remand, the Government argued that the non-dynamite counts should be reinstated; Respondents argued that they should remain dismissed. (RT 4/14/80, pps. 5-7, 21-22). On May 12, 1980 Judge Redden ruled that if the Government wished to proceed with those counts, a new indictment would be necessary. (RT 5/12/80, p.7)

Although the Government had indicated that it was satisfied with the December 1975 indictment, it brought forth a new indictment with increased charges. Since some of the charges were new, and exposed Respondents to greater risk of incarceration, motions to dismiss for vindictive prosecution were filed. (CR-R-97)

After hearing arguments on the vindictive prosecution claim,[12] Judge Redden issued an (amended) Order on August 12, 1980 denying the motion as toward Respondents Dennis Banks, Russ Redner and Kenneth Loud Hawk. However, the Order granted a dismissal with prejudice for Respondent KaMook Banks. (CR-R-120, CR-R-122)

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[12]Arguments on other motions were also heard in the District Court after remand. One motion and hearing produced evidence that Respondents had been victims of Government invasion into their private lives in a manner which the Government had previously denied. See: RT 6/23/80 pps. 153-183; CR-R-75, CR-R-76, CR-R-85.

Another motion was for disclosure of electronic surveillance, filed by Respondents in 1975 and renewed in 1980. However, it was not until March 10, 1983 that the Government responded to that motion. On that date United States Attorney Charles Turner admitted that his office "had been dilatory. [The motion] had been pending for seven years." (RT 3/10/83, p. 3)

Dennis Banks filed a notice of appeal from the denial of the vindictive prosecution claim on August 15, 1980.[13] Russ Redner did likewise on August 21, 1980, as did Kenneth Loud Hawk on August 22, 1980. The Government did not file its notice until September 2, 1980. (CR-R-125, R-130, R-133, R-139)

Respondents Dennis Banks, Redner and Loud Hawk filed their opening brief on October 15, 1980, and the Government filed its brief on November 3, 1980. The case was argued and submitted on January 7, 1981.

On July 29, 1982 the Court of Appeals reversed the dismissal of the indictment as to KaMook Banks and also dismissed the appeal of the other Respondents under the authority of United States v. Hollywood Motor Car Co., 458 U.S. 263, 102 S. Ct. 3081, 73 L.Ed.2d 754 (1982). Respondents' Petitions for rehearing and for certiorari were denied on October 5, 1982 and January 10, 1983 respectfully (459 U.S. 1117).[14] The Mandate of the Court of Appeals issued on January 31, 1983. (App. 5a)

Trial was set to begin on April 11, 1983, but was reset to May 3, 1983 at the request of the Government. Two additional continuances were made on the Court's motion. Respondents objected to each continuance. (App. 125a)

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[13]Respondents Dennis Banks, Redner and Loud Hawk took their appeal on the authority and reasoning of United States v. Burt, 619 F.2d 831 (9th Cir., 1980) and United States v. Griffin, 617 F.2d 1342 (9th Cir., 1980). They were taken in good faith and not for reasons of delay. (App. 14a, 1125a)
Again the appeals were consolidated and "expedited." (CR-R-144, CR-R-145, CR-R-146, CR-R-149)

[14]Respondent KaMook Banks filed her Petition for Certiorari based on the claim that facts underlying her vindictive prosecution claim not only distinguished her case from United States v. Goodwin, 102 S. Ct. 2485 (1982), but provided strong support for a claim of vindictive prosecution based on the reasoning of that case.

The remaining Respondents filed their Petition alleging that severance of the cases would allow KaMook Banks to create the law of this case before this Court while they could not participate. The result would have been not only a deprivation of their appellate rights, but also a needless waste of judicial, governmental and defense resources. This claim was based on the holding of Cohen v. Beneficial Industrial Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), and the line of this Court's cases criticizing piecemeal disposition of cases on appeal.

On May 20, 1983 the District Court again dismissed the indictment, finding that Respondent's rights to a Speedy Trial under the Sixth Amendment and to Due Process were violated by the delay. The Government filed its notice of appeal on June 17, 1983. Again, the appeal was "expedited." (CR-R-271)

The Government filed its opening brief, after requesting an extension, on August 16, 1983. Respondents submitted their brief on September 1 1983.[15] Argument was heard on January 4, 1984, and the Court of Appeals affirmed on August 30, 1984. (App. 1a-25a)

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[15]The Government petitioned both the District Court and the Ninth Circuit to allow it to keep its subpoenas alive during the pendancy of this appeal. Both Courts denied the request. (CR-R-278, CR-R-281, CR-R-289)

The Court of Appeals applied the four-prong balancing test of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (length of delay, reason for delay, assertion of right and prejudice) to the unique facts of this case, and upheld the decision of the District Court that Respondents had been denied their right to a speedy trial.[16] The Court gave effect to the holding of United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982) by concluding that a person is "accused" when the Government appeals an Order dismissing a case over its objection.[17] The Court noted that Respondents were subject to imposition of restraints at any time during the pendency of the appeal, and were still suffering under the interference caused by the continuing public accusation embodied in the Government's vigorous and continuous efforts to reinstate the charges against them. (App. 8a)

In discussing the first pre-trial appeal the Court distinguished the gun counts from the dynamite counts. The delay attendant to the former was considered "wholly unnecessary" given the Government's irresponsible refusal to proceed to trial, and was accordingly balanced heavily against

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[15]The Government petitioned both the District Court and the Ninth Circuit to allow it to keep its subpoenas alive during the pendancy of this appeal. Both Courts denied the request. (CR-R-278, CR-R-281, CR-R-289)

[16]The District Court had also dismissed the case because the delay had also violated Respondent's due process rights. The Appellate Court's opinion did not even address this secondary basis of dismissal.

[17]In MacDonald the charges were dismissed on the motion of the Government, rather than over its objection. MacDonald was no longer a party to any legal proceeding designed to bring him to trial on any charges, and was no longer "the subject of public accusation." MacDonald 456 U.S. at 9.

the Government. (Id., at 12a) The Court found that the Government's appeal of dynamite counts was reasonable and would justify a reasonable delay, but that a forty-six month delay on a pre-trial appeal was not reasonable. (Id. at 12a-13a) Therefore, this delay was also put on the Government's side of the scale, but allocated less weight.

As for the second appeal, the Court did not weigh the delay against the Government nor Respondents, as it did not consider the twenty-three months consumed in this "expedited" appeal "undue delay." However, it "wholly excused" the "additional delay of six months that occurred as a result of the defendants seeking certiorari from the judgment of this court."[18, 19] (App. 15a)

Both the majority and Judge Wallace in dissent found that Respondents had "adequately asserted their rights to a speedy trial," having objected to delay as early as May 12, 1976, and having continued to do so after each remand. (App. 15a, 24a)

The Court agreed with the District Court's finding of prejudice to the defense (particular witnesses who had died or had completely lost their memories) and to the defendants (anxiety from unresolved criminal charges over seven-and-a-half years) from this "inordinate delay." However the Court did not entertain a detailed analysis of the prejudice in this case, as it concluded that prejudice need not be shown in order to successfully assert a violation of speedy trial rights. Thus, this factor was not weighed heavily in the balance. (App. 16a-17a)

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[18]It should be noted that the District Court considered the delay on the second appeal (which it calculated as twenty-nine months) to have been unduly long, as it was an "expedited" appeal that followed on the heels of a four-year appellate delay.

[19]The Court's calculation of six months delay attendant to the process of seeking certiorari is curious. The petitions were filed in early December, 1982 and were denied on January 10, 1983. Respondents' petitions for reconsideration were not denied until October 5, 1982.

The Court found all four factors on the side of Respondents, and therefore upheld the District Court's dismissal. (Id., at 17a-18a)

The Government filed a Petition for Reconsideration, which was denied on Janu y 8, 1985. With no Motion to Stay Mandate having been filed, the Mandate issued on January 16, 1985. Thereafter the Government filed an untimely Motion to Stay Mandate followed by a Motion to Recall Mandate. These motions were denied by the Court of Appeals on February 28, 1985 (Respondents' App. 9a-20a). The Government filed its Petition for a Writ of Certiorari on February 26, 1985.

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REASONS WHY THE WRIT SHOULD BE DENIED

Since the Government willingly let the mandate of the Circuit Court issue, this case is now moot. The Court of Appeals upheld a pre-trial dismissal of the indictment with prejudice, and the issuance of the mandate put that Order into effect.

Even if this were still a live case, the issues it presents are not important enough to warrant review. No cases have been halted in the appellate courts awaiting this Court's review of Loud Hawk. In fact, the decisions of the District and Circuit courts have been cited only twice in the last twenty-two months, and not for any proposition associated with the Questions Presented to this Court. Out of one hundred thirty four reported federal cases involving federal defendants' claims of denial of a speedy trial (since the date of the District Court dismissal in this case) only seven cases raised plausable claims grounded in purely constitutional issues (87% raised the Speedy Trial Act). The instant case is the only one of the one hundred fifty raising Sixth Amendment issues of appellate delay.

The Questions Petitioner asks this Court to consider are grounded in meritless argument. The analysis presented by the Government requires a drastic departure from the careful balancing approach of Barker v. Wingo. Rather than allow a balancing of factors, Petitioner seeks to substitute a test which it could never lose. This test would afford Sixth Amendment protection only to those defendants who having successfully defended against Government efforts to reinstate indictments do not need it.

Furthermore, the decision below reflects a correct application of United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). Since the Government has never equivocated from its accusation of crime, nor sought dismissal of any charges, and has attempted (and could always have renewed its attempt) to have bail restrictions imposed on

defendants during an appeal, Respondents were continuously "formally accused." The appeal was b t a part of the Government's unhalting effort to try, convict, and incarcerate them. There are no cases in conflict with the holding of the Court of Appeals.

Likewise, there are no cases in conflict with the decision below that a per se rule should not be adopted allowing pre-trial criminal appeals to consume limitless amounts of time. This rule that the Government seeks would exclude even clearly inappropriate appellate delay from scrutiny under the Sixth Amendment.

The Court of Appeals was equally correct in rejecting the Government's desire to escape responsibility under the Sixth Amendment for the delay it willfully created. To have sustained the Government's argument would have been to hold that whenever a suppression order is entered against the Government with respect to only one part of a criminal case, it can contumaciously refuse to proceed to trial on the unaffected counts after being denied a stay by both the trial and appellate benches, and suffer no consequence under Barker v. Wingo for such recalcitrance.

Given the outrageous length of pre-trial delay in this 1975 case, the fact of the Government's refusal to proceed to trial in violation of Orders of two courts, the strong assertion of speedy trial rights by defendants, and the personal and defense-related prejudice suffered, the Circuit Court was correct in finding all four Barker factors weighing in Respondent's favor. There is no error below for this Court to correct.

Should this Court nonetheless desire to consider an issue of pre-trial appellate delay and the Sixth Amendment, the Loud Hawk case is an inappropriate selection. This is a mutant speedy trial case with a muddy record. It would provide poor material from which to weave any principle. Bizzare cases make incomprehensible law.

Finally, review should not be granted because the District Court found an independant basis for dismissal (a due process violation) which was neither addressed by the appellate court nor by the Questions Presented by the Government's Petition for Certiorari. It would be absurd for this Court to do as the Government asks (Petition for Certiorari at 27-28 fn. 21) and take upon itself the task of reviewing a purely factual question on a voluminous record without the aid of any prior appellate review.

I. This case is now moot.

The Court of Appeals denied the Government's Petition for Reconsideration on January 8, 1985. As no timely motion to stay mandate was filed, the mandate issued on January 16, 1985.

It is clear that the issuance of a mandate does not deprive this Court of jurisdiction. Aetna Casulty and Surety Co. v. Flowers, 304 U.S. 464, 67 S.Ct. 798, 91 L.Ed. 1024 (1947); Carr v. Zaja, 283 U.S. 52, 51 S.Ct. 360, 75 L.Ed. 836 (1931); Louisville & Nashville Railroad Company v. Behlmer, 169 U.S. 644, 18 S.Ct. 502, 42 L.Ed. 889 (1898); The Conqueror, 166 U.S. 110, 17 S.Ct. 510, 41 L.Ed. 937 (1896). However, when the mandate in this case issued, it put into the effect Judge Redden's Order dismissing the case with prejudice. No indictment is now pending, and no new indictment can be issued even if this Court reversed the judgement of the Court of Appeals.

In United States v. Villamonte-Marquez, __U.S.__, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983) this Court rejected a mootness argument in a criminal case. The Court of Appeals had reversed convictions in that case, finding a Fourth Amendment violation. After the mandate of that Court issued, the Government dismissed the underlying indictment pursuant to FRCrP 48(a). A month thereafter the United States filed its petition for certiorari. 77 L.Ed.2d at 34-35.

In finding no mootness problem the Court stated:

> The Government has sought review of the Court of Appeals' decision reversing respondent's convictions. Ordinarily our reversal of that decision would reinstate the judgment of conviction and the sentence entered by the District Court. . . The fact that the Government did not obtain a stay, thus permitting the issuance of the mandate of the Court of Appeals, would not change the effect of our reversal. . . Under our reasoning in Mancusi v. Stubbs [citation omitted], the absence of an indictment does not require a contrary conclusion. Further, it is settled law that the preliminary steps in a criminal proceeding are "merged" into a sentence once the defendant is convicted and sentenced. . . Upon respondents' conviction and sentence, the indictment that was returned against them was merged into their convictions and sentences, thus obviating any need for a separate reinstatement of the

> original indictment. . . [A] successful effort on the part of the Government to reverse the judgment of the Court of Appeals would have the effect of reinstating the judgment of conviction.

Villamonte-Marquez, 77 L.Ed.2d at 26, fn.2.

Since Respondents have never been convicted, there is no judgement for the dismissed indictment in this case to merge into.

Furthermore, unlike both Villamonte-Marquez, supra, and Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972), there is nothing further that the District Court could do even if this Court reversed the Judgement of the Court of Appeals.

In Mancusi, supra, the mandate of the appellate court (ordering that a prior Tennessee conviction was unconstitutional and could not be used for enhancement purposes at sentencing) had issued and, pursuant to that order, Stubbs had been resentenced. He received the same sentence as before, however, because still another conviction from Texas was used as a predicate.

This Court held that

> Until it can be said with certainty that the New York courts may validly resentence respondent to the same term as they imposed prior to the decision of the Court of Appeals now under review here, petitioner continues to have an interest in the availability of the Tennessee conviction as a support for second-offender sentencing of respondent.

Mancusi, 408 U.S. at 206. It based its reasoning on two cases, both of which stand for the proposition that obedience to a judgement which has taken effect does not necessarily give up the ability to have that judgement reversed.

In Bakery Drivers v. Wagshal, 333 U.S. 437, 68 S.Ct. 630, 92 L.Ed. 792 (1948) a union had appealed from an injunction issued by the District Court. The Court of Appeals dismissed, and thereafter the union lifted its boycott. The case was not moot, however, as the union was merely obeying the injunction while attempting to have it reviewed and reversed.

Likewise, in Dakota County v. Glidden, 113 U.S. 222, 5 S.Ct. 428, 28 L.Ed.981 (1885), this Court rejected another mootness argument:

> There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reversed the judgment by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal.

113 U.S. at 222.

Thus, money given up after the issuance of a mandate can be recovered if the judgement is reversed. Likewise, land given up can be gotten back.

In criminal cases the Government can have one leg upholding a sentence declared valid as long as there is a possibility that another leg which is presently accomplishing the same task may be withdrawn. Indeed, the Government can decide that it does not want to further prosecute a case without giving up on having a formerly secured judgement of conviction reinstated.

However, where the Government has willingly let a dismissal with prejudice take effect on a ten-year-old case, knowing that there is no prior judgement that can be reinstated if the appellate judgement is reversed, there is no case to be continued. When an appellate mandate upholding a dismissal with prejudice issues, it can only mean that the Order of the District Court has finally been put into effect, and that the appellate process is terminated. Calmitsch v. Ricsley, 705 F.2d 351 (9th qir., 1983) For the first time in the decade long life of this case, a dismissal finally means that the case is over, thus rendering the petition for certiorari moot.

2. The issues presented are not important enough to warrant review.

The questions that this case provide are ones that are limited to interesting, but nonetheless rather academic and infrequent queries under the Speedy Trial Clause of the Sixth Amendment. The Government asserts that the issue of pre-trial appellate delay is important enough to merit the attention of this Court. The facts do not bear out the Government's contention.

Since the date of Judge Redden's dismissal on Speedy Trial Clause grounds (May 20, 1983) there have been one-hundred thirty four (134)[20] reported federal decisions involving demands by federal defendants for dismissal due to alleged denial of a speedy trial. Ninty-four (94) of those cases relied on statutory Speedy Trial grounds alone.[21]

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[20]These statistics contain cases reported as of March 8, 1985. The cases are not listed in the table of authorities, as they are included for statistical rather than precedential reasons.

[21]The Speedy Trial Act is 18 U.S.C. Section 3161 et seq. The cases are: UNITED STATES v. ANDERTON, 752 F.2d 1005 (5th Cir., 1985); UNITED STATES v. BROWN, ___ F.2d ___, (No. 83-5330), (9th Cir., 1985); UNITED STATES v. DORMAN, 752 F.2d 595 (11th Cir., 1985); UNITED STATES v. GOLOMB, ___ F.2d ___, (No. 590, Docket 84-1248), (2nd Cir., 1985); UNITED STATES v. KROESSER, 750 F.2d 833 (11th Cir., 1985); UNITED STATES v. LATHAM, ___ F.2d ___, (No. 83-2686), (7th Cir., 1985); UNITED STATES v. RODRIGUEZ-FRANCO, 749 F.2d 1555 (11th Cir., 1985); UNITED STATES v. TIBBOEL, ___ F.2d ___, (No. 84-1072), (7th Cir., 1985); UNITED STATES v. VIGIL-MONTANEL, ___ F.2d ___, (No. 84-5159), (11th Cir., 1985); UNITED STATES v. ADAMO, 742 F.2d 927 (6th Cir., 1984); UNITED STATES v. BECK, 729 F.2d 1329 (11th Cir., 1984); UNITED STATES v. BLACK, 733 F.2d 349 (4th Cir., 1984); UNITED STATES v. BOURNE, 743 F.2d 1026 (4th Cir., 1984); UNITED STATES v. BROWN, 736 F.2d 807, (1st Cir., 1984); UNITED STATES v. BRYANT, 726 F.2d 510, (9th Cir., 1984); UNITED STATES v. CAREY, 746 F.2d 228 (4th Cir., 1984); UNITED STATES v. DARBY, 744 F.2d 1508 (11th Cir., 1984); UNITED STATES v. DENNIS, 737 F.2d 617 (7th Cir., 1984); UNITED STATES v. DiPASQUALE, 740 F.2d 1282 (3rd Cir., 1984); UNITED STATES v. FERRIS, 751 F.2d 436 (1st Cir., 1984); UNITED STATES v. FREY, 735 F.2d 350 (9th Cir., 1984); UNITED STATES v. GONSALVES, 735 F.2d 638 (1st Cir., 1984); UNITED STATES v. GONZALEZ, 748 F.2d 74 (2nd Cir., 1984); UNITED STATES v. HARRIS, 724 F.2d 1452 (9th Cir., 1984); UNITED STATES v. HELDT, 745 F.2d 1275 (9th Cir., 1984); UNITED STATES v. HENDERSON, 746 F.2d 619 (9th Cir., 1984); UNITED STATES v. HINES, 728 F.2d 421 (10th Cir., 1984); UNITED STATES v. JOHNPOLL, 739 F.2d 702 (2nd Cir., 1984); UNITED STATES v. MARTIN, 742 F.2d 512 (9th Cir., 1984); UNITED STATES v. MARTINEZ, 749 F.2d 601 (10th Cir., 1984); UNITED STATES v. MARTINEZ, 749 F.2d 623 (11th Cir., 1984); UNITED STATES v. MASSA, 740 F.2d 629 (8th Cir., 1984); UNITED STATES v. MASTRANGELO, 733 F.2d 793 (11th Cir., 1984);

Twenty-one cases raised both constitutional and statutory speedy trial grounds, but of those only six raised cognizable

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[21] (continued) UNITED STATES v. OTERO-HERNANDEZ, 743 F.2d 857 (11th Cir., 1984); UNITED STATES v. PACKER, 730 F.2d 1151 (8th Cir., 1984); UNITED STATES v. PIROLLI, 742 F.2d 1382 (11th Cir., 1984); UNITED STATES v. POLLOCK, 726 F.2d 1456 (9th Cir., 1984); UNITED STATES v. PRINGLE, 751 F.2d 419 (1st Cir., 1984); UNITED STATES v. PUETT, 735 F.2d 1331 (11th Cir., 1984); UNITED STATES v. RICHMOND, 735 F.2d 208 (6th Cir., 1984); UNITED STATES v. RUBIN, 733 F.2d 837 (11th Cir., 1984); UNITED STATES v. RUGGIERO, 726 F.2d 913 (2nd Cir., 1984); UNITED STATES v. RUSH, 738 F.2d 497 (1st Cir., 1984); UNITED STATES v. RUSSO, 741 F.2d 1264 (11th Cir., 1984); UNITED STATES v. SARRO, 742 F.2d 1286 (11th Cir., 1984); UNITED STATES v. SAVOCA, 739 F.2d 220 (6th Cir., 1984); UNITED STATES v. SCAIFE, 749 F.2d 338 (6th Cir., 1984); UNITED STATES v. SEVERDIJA, 723 F.2d 791 (11th Cir., 1984); UNITED STATES v. SHAID, 730 F.2d 225 (5th Cir., 1984); UNITED STATES v. SMITH, 750 F.2d 1233 (4th Cir., 1984); UNITED STATES v. STEAD, 745 F.2d 1170 (8th Cir., 1984); UNITED STATES v. STOCKWELL, 743 F.2d 123 (2nd Cir., 1984); UNITED STATES v. TEDESCO, 726 F.2d 1216 (7th Cir., 1984); UNITED STATES v. TERTROU, 742 F.2d 538 (9th Cir., 1984); UNITED STATES v. TURNER, 725 F.2d 1154 (8th Cir., 1984); UNITED STATES v. VAN BRANDY, 726 F.2d 548 (9th Cir., 1984); UNITED STATES v. WALBORN, 730 F.2d 192 (5th Cir., 1984); UNTIED STATES v. WHITAKER, 722 F.2d 1533 (11th Cir., 1984); UNITED STATES v. WIEHOFF, 748 F.2d 1158 (7th Cir., 1984); UNITED STATES v. YUNIS, 723 F.2d 795 (11th Cir., 1984); UNITED STATES v. ZIELIE, 734 F.2d 1447 (11th Cir., 1984); UNITED STATES v. CAMPBELL, 706 F.2d 1138 (11th Cir., 1983); UNITED STATES v. CAPARELLA, 716 F.2d 976 (2nd Cir., 1983); UNITED STATES v. DALY, 716 F.2d 1499 (9th Cir., 1983); UNITED STATES v. DUNN, 706 F.2d 153 (5th Cir., 1983); UNITED STATES v. GARRETT, 720 F.2d 705 (1983); UNITED STATES v. HAUSMANN, 711 F.2d 615 (5th Cir., 1983); UNITED STATES v. HOPE, 714 F.2d 1084 (11th Cir., 1983); UNITED STATES v. HOWELL, 719 F.2d 1258 (5th Cir., 1983); UNITED STATES v. JANIK, 723 F.2d 537 (7th Cir., 1983); UNITED STATES v. McCOWN, 711 F.2d 1441 (9th Cir., 1983); UNITED STATES v. MANFREDI, 722 F.2d 519 (9th Cir., 1983); UNITED STATES v. MULHERIN, 710 F.2d 731 (11th Cir., 1983); UNITED STATES v. NOVAK, 715 F.2d 810 (3rd Cir., 1983); UNITED STATES v. PAGAN, 714 F.2d 225 (2nd Cir., 1983); UNITED STATES v. PEREZ-REVELES, 715 F.2d 1348 (9th Cir., 1983); UNITED STATES v. PITEO, 726 F.2d 50 (2nd Cir., 1983); UNITED STATES v. SALDIVAR, 710 F.2d 699 (11th Cir. 1983); UNITED STATES v. SCHMIDT, 711 F.2d 595 (5th Cir., 1983); UNITED STATES v. SHAHRYAR, 719 F.2d 1522 (11th Cir., 1983); UNITED STATES v. SNYDER, 707 F.2d 139 (5th Cir., 1983); UNITED STATES v. WILLIAMS, 711 F.2d 748 (6th Cir., 1983); UNITED STATES v. WILSON, 720 F.2d 608 (9th Cir., 1983); UNITED STATES v. MALDONADO, ___ F. Supp. ___, (No. 83-20008-01), (Jan. 4, 1985); UNITED STATES v. COVA, 580 F.Supp. 588 (1984); UNITED STATES v. FALVO, 598 F.Supp. 873 (1984); UNITED STATES v. GREEN, 582 F.Supp. 265 (1984); UNITED STATES v. JUVENILE, 599 F.Supp 1126 (1984); UNITED STATES v. RAMOS, 588 F.Supp. 1223 (1984); UNITED STATES v. SMITH, 588 F.Supp. 1403 (1984); UNITED STATES v. WOLLSCHLAGER, 588 F.Supp. 1572 (1984); GOVERNMENT OF THE VIRGIN ISLANDS v. FRANCIS, 98 F.R.D. 626 (1983); UNITED STATES v. SMITH, 563 F.Supp. 217 (1983); UNITED STATES v. TEST, 584 F.Supp. 800 (1983); UNITED STATES v. BRADLEY, 566 F.Supp. 1392 (1983) (This one case also raised issued under the Interstate Agreement on Detainers, 18 U.S.C., Appendix (1976).

Sixth Amendment Claims. [22, 23] Only eighteen out of the one-hundred thirty four cases raised purely constitutional speedy trial claims, and of those eleven were either frivolous or near frivolous.[24]

Of the seven reported decisions that raised purely constitutional claims containing plausible arguments, five were based on indictments so old as to predate the sanctions of the Speedy Trial Act.[25] (See: United States v. Horton, 646 F.2d 181 [5th Cir., 1981]; United States v. Litton Systems, Inc., 722 F.2d 264 [5th Cir., 1984]) Two of those five reported opinions were U.S. v. Loud Hawk.

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[22] The six cases that raised non-frivolous constitutional claims were: UNITED STATES v. BOUNOS, 730 F.2d 468 (7th Cir., 1984); UNITED STATES v. CROSBY, 713 F.2d 1066 (5th Cir., 1983); UNITED STATES v. FELTON, 592 F.Supp. 172 (1984); UNITED STATES v. HERNANDEZ, 724 F.2d 904 (11th Cir., 1984); UNITED STATES v. MITCHELL, 723 F.2d 1040 (1st Cir., 1983); UNITED STATES v. SAMPLES, 713 F.2d 298 (7th Cir., 1983).

[23] The other fifteen cases, where claims to which the Sixth Amendment were clearly inapplicable were: UNITED STATE v. MARUSKA, 717 F.2d 1222 (8th Cir., 1983); UNITED STATES v. AMADO, ___ F.2d ___, (No. 84-1784), (1st Cir., 1985); UNITED STATES v. AMBROSE, 707 F.2d 1209 (11th Cir., 1983); UNITED STATES v. AUSTIN, 99 F.R.D. 292 (1983); UNITED STATES v. BROWN, 720 F.2d 1059 (9th Cir., 1983); UNITED STATES v. GARCIA, 741 F.2d 363 (11th Cir., 1984); UNITED STATES v. KIDD, 734 F.2d 409 (9th Cir., 1984); UNITED STATES v. KUBIAK, 704 F.2d 1545 (11th Cir., 1983); UNITED STATES v. MICHEL, 590 F.Supp. 1135 (1984); UNITED STATES v. PAJARI, 715 F.2d 1378 (8th Cir., 1983); UNITED STATES v. RADUE, 707 F.2d 493 (11th Cir., 1983); UNITED STATES v. REME, 738 F.2d 1156 (11th Cir., 1984); UNITED STATES v. ROPER, 716 F.2d 611 (4th Cir., 1983); UNITED STATES v. SANCHEZ, 722 F.2d 1501 (11th Cir., 1984); UNITED STATES v. SNOWDEN, 735 F.2d 1310 (11th Cir., 1984).

[24] TIEMENS v. UNITED STATES, 724 F.2d 928 (11th Cir., 1984); UNITED STATES v. BROWN, 742 F.2d 359 (7th Cir., 1984); UNITED STATES v. GREENE, 737 F.2d 572 (6th Cir., 1984); UNITED STATES v. JORGE-SALON, 734 F.2d 789 (11th Cir., 1984); UNITED STATES v. MARLER, 583 F.Supp. 1456 (1984); UNITED STATES v. McGIFFEN, 578 F.Supp. 899 (1983); UNITED STATES v. MILLS, 704 F.2d 1553 (11th Cir., 1983); UNITED STATES v. NAPPER, 574 F.Supp. 1527 (1983); UNITED STATES v. PULLEN, 721 F.2d 788 (11th Cir., 1983); UNITED STATES v. WALKER, 710 F.2d 1062 (5th Cir., 1983); UNITED STATES v. WILLIAMS, 738 F.2d 172 (7th Cir., 1984).

[25] UNITED STATES v. DELEON, 710 F.2d 1218 (7th Cir., 1983); UNITED STATES v. DENNARD, 722 F.2d 1510 (11th Cir., 1984); UNITED STATES v. LITTON SYSTEMS, INC., 722 F.2d 264 (5th Cir., 1984); UNITED STATES v. LOUD HAWK, 741 F.2d 1184 (9th Cir., 1984); UNITED STATES v. LOUD HAWK, 564 F.Supp. 691 (1983); UNITED STATES v. RICHARDS, 707 F.2d 995 (8th Cir., 1983); UNITED STATES v. SOLOMON, ___ F.2d ___, (No. 84-3069, 84-3070), (9th Cir., 1985)

In the last twenty-two months, seventy-one percent of the claims of denial of speedy trial were based on the Act alone. Eighty-seven percent of the claims raised the Act, while less than ten percent raised non-spurious constitutional claims. Only five percent of the cognizable claims asserted purely constitutional grounds (and two out of those seven claims are this case). If aged cases (to which the Act could not apply) are eliminated from consideration, then less than two-percent of the one-hundred thirty four claimed deprivations of speedy trial were, like that of the Loud Hawk case, based on good faith invocations of the Sixth Amendment.

However, the Loud Hawk case is the only case of those reported since May, 1983 to raise the even rarer issue of Sixth Amendment deprivation during interlocutory appeal. It is therefore unremarkable that the District Court decision has been cited only once, and that by Judge Redden on an immigration case, soley for the purpose of comparison of "Kafkaesque . . . principle[s]." See: Hi-Hat Restaurant, Inc. v. I.N.S., 569 F. Supp. 776 (D.C. Or., 1983).

Although the Ninth Circuit decision has existed for seven months, it also has only been cited once, and not on issues of appellate delay. See: United States v Solomon, ___F.2d___ (Nos. 84-3069. 84-3070) (9th Cir., Feb.22, 1985). We know of no proceeding which has ground to a halt in the appellate courts, waiting for this Court to rule on this case.

The facts show the question of pre-trial appellate delay to be a rare one at best. Rather than the Loud Hawk case's embodying a pressing question of importance that demands this Court's attention, it contains an endangered and mutant issue which, however interesting and bizarre, is sterile.

3. The Questions Presented by Petitioner, and the arguments in support thereof, are entirely without merit.

The Government's proposed questions have as a foundation assumptions that are not only illogical, but are abhorrent to the method of analysis of speedy trial questions dictated by this Court.

The case of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) defines the analytic approach this Court has ordered for examining a claim of deprivation of the right to a speedy trial.[26]

Rejecting "inflexible approaches," the Court adopted a "balancing test" which required trial courts to look at the peculiar facts of each case in a standardized framework. "[S]ome of the factors which courts should assess in determining whether a particular defendant has been deprived of his right . . .[include l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 529-530. The subsequent decision of this Court In Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973) affirmed the mandate that "courts must engage in a difficult and sensitive balancing process," rather than merely examine each case to see if a particular factor exists. 414 U.S. at 26.

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[26]There were only a few occasions prior to Barker wherein this Court considered a speedy trial claim. From the repeated ad hoc attempts to approach the subject that those cases represented, it became clear that a standardized approach to the area was essential. Barker represents that approach. For development of the law see: Beavers v. Haubert, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed.2d 950 (1904); Pollard v. United States, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957); United States v. Ewell, 383 U.S. 119, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 98, 18 L.Ed.2d 1 (1967); Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) and United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

In balancing the factors, the length of delay is looked at first. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." 407 U.S. at 530.

Thereafter the other factors are thrown onto the scales. Depending on the reason for delay asserted, this factor can acquire different weights in the balance. A defendant's demand for a speedy trial is "entitled to strong evidentiary weight." Id., at 531. Prejudice to the person and to the defense is the last factor, although it need not be affirmatively demonstrated to tip the scales in favor of defendant. (See: Moore, supra)[27]

It is clear that the Sixth Amendment is not concerned with every type of delay before trial. It does not protect a person during a period "before a defendant is indicted, arrested or otherwise officially accused." MacDonald, supra, 456 U.S. at 6; see also Marion, supra, 404 U.S. at 313. If charges are dropped and the case returned to investigative status, there is no Sixth Amendment issue. MacDonald, supra.

Thus, the holdings of this Court dictate that when a speedy trial claim is asserted, the trial court must first determine whether the Sixth Amendment applies at all. If it does not, none of the Barker factors need be examined, and the concerns of the Due Process Clause of the Fifth Amendment are considered. If the Sixth Amendment does apply to the delay, then the trial court must determine the length of delay. If the delay is sufficiently long to be presumptively prejudicial, then a full analysis of all factors ensues.

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[27] In fact, the "Sixth Amendment right to a speedy trial is * * * not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by the statutes of limitations." United States v. MacDonald, supra 456 U.S at 8. The Government, in phrasing the Questions Presented as it does, invites this Court to depart from the standardized approach of Barker and return to the former anarchistic approach to the subject.

Either a defendant is or is not protected by the Sixth Amendment. Either he or she is or is not "officially accused." MacDonald, supra, 456 U.S. at 6. The Government must recognize that Respondents, having spent the last ten years as defendants in on-going proceedings designed to convict and incarcerate them, have been and are "officially accused." Since the Government also knows that the Barker scales balance in Respondents' favor, it tries to skew them.

Since the length of delay is the triggering mechanism under Barker, the Government attempts to improperly defuse that factor, knowing that to artificially recalculate the length of delay is to deprive a defendant of the protection of the Sixth Amendment, just as if he or she had not been "officially accused."

The length of delay is the length of time that a defendant has awaited trial while protected by the Sixth Amendment. Whether that delay was justified, whether the defendant acquiesced in the delay, and whether the defendant was hurt by the delay are factors that help determine if the period of delay has deprived a criminal defendant of Sixth Amendment protection. Barker, supra.

Nowhere is there any authority for the proposition that a court must first determine the reason for the delay (e.g., the Government appeal, defendants' appeal and various subsidiary factual issues) and the prejudice suffered (e.g. considerations of release restrictions, etc.)[28] and then recalculate the length of delay. Under such a strained and illogical approach, would the analysis begin anew, with the length of delay defined as a period less than one where a defendant is "officially accused?" How then would the other factors be "balanced?"

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[28] Respondents do not accept the Government's erroneous characterization of their release status during the Government's appeals as "free of all restrictions on their liberty." See discussion, infra.

The Government's suggested departure from the analytical approach to Sixth Amendment claims established by this Court becomes totally absurd when it contends that the length of delay should be determined by which side is ultimately successful on pre-trial appeals.[29] Petition for Certiorari at 20-21.[30] Such a per se test is not only without support in law

[29]The Government refers to Respondent's motions which were reversed on appeal as "legally erroneous," and suggests that we somehow had the power to "induce the district court to err." Petition for Certiorari at 12. The contention seems to be that the motions for dismissal were not well founded. Although the appellate courts reversed the district court dismissals, none found the claims without merit. If the Government's mischaracterization of Respondents' dismissal claims is to be believed, then the six-plus years taken to "correct" such "erroneous" claims becomes even more suspect.

[30]Cited in "support" of this novel proposition is a dissent by a non-panel member from denial of rehearing en banc in United States v. Brown, 520 F.2d 1106 (D.C. Cir., 1975). That authority is hardly persuasive, as the majority found that Brown was denied his right to a speedy trial, and calculated time consumed on a successful Government appeal as part of the period of delay (14 months). 520 F.2d at 1109.

United States v. Auerbach, 420 F.2d 921 (5th Cir.), reh'g denied, 423 F.2d 676 (1969, cert. denied, 399 U.S. 905 (1970) is a pre-Barker case which, despite its archaic standard, does not support the Government's proposition. That court "considered" (rather than balanced) factors in considering a speedy trial claim. (Auerbach established "bridges" to cross, rather than factors to be weighed. See: Murray v. Wainwright, 450 F.2d 465, 471 [5th Cir., 1971]) It counted the appeal time as part of the length of delay, considered that the delay was not caused by any "arbitrary, capricious, vexatious, oppressive, deliberate or negligent conduct on the part of the Government," and concluded the defendants suffered no serious prejudice from the delay. Having counted the appellate delay, the Court then considered whether the defendants waived their rights to a speedy trial. It considered the repeated applications of the defendants to the courts as an implicit waiver of the speedy trial right. 420 F.2d at 924-925

United States v. Litton Systems, Inc., 722 F.2d 264 (5th Cir., 1984), cert. denied, No. 83-1550 (May 14, 1984) does not support the Government's contention either. In that case the delays while the defendants were charged were counted. The fact that Litton sought delay was its undoing.

The various state cases cited by the Government do not help render its contention any less frivolous. State v. White, 118 Ariz. 47, 574 P.2d 840 (1977) involved questions of "Arizona law only," and reasonably concluded that the state's speedy trial act did not require pre-trial appeals to be disposed of in sixty days. 574 P.2d at 849; State v. Sieckmann, 3 Or. App. 454, 474 P.2d 367 (1970) was a pre-Barker case which did consider the appeal time as delay, but concluded that since "the delay was neither vexatious, capricious, oppressive or prejudicial to defendant, we find no merit in this assignment

or logic, it would overrule Barker's balancing approach, and render every defendant who is a party to a pre-trial appeal unprotected by the Sixth Amendment, regardless of the length of delay, reasons for delay, demand for a speedy trial, or prejudice suffered.[31]

The questions presented by the Government have as their foundation a complete refutation of the balancing test of Barker v. Wingo, supra. There being no need to overrule Barker, this Court should not consider the Government's contentions.

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[30](continued)of error." 474 P.2d at 370. The analysis in that case was grounded in State v. Robinson, 3 Or. App 200, 473 P.2d 152 (1970) which exhibited the antique proposition that no speedy trial claim can succeed unless the cause of delay is "'improper and the defendant suffers actual prejudice. * * * Nor * * * can he complain of delays resulting from such things as court procedures.'" 473 P.2d at 158; People v. Jamerson, 198 Colo. 92, 596 P.2d 764 (1979) clearly counted the delay, but did not weigh the appeal time against either side: "[T]he delay * * *has now stretched to over three years. [T]he reasons for delay * * * mitigate this factor. * * * For more than a year and a half, the case has been tied up in various appeals." 596 P.2d at 768; Scarbrough v. State, 76 Wis. 2d 87, 250 N.W.2d 354 (1977) is the only case that provides the Government's argument with any support. Yet, that case is distinguishable as the defendant refused to proceed to trial, and the delay was only a matter of months. Moreover, that case recognized that "[w]e cannot however, under Barker, fail to give weight to delays in bringing criminal cases to trial caused by inadequate judicial resources and mounting caseloads.

[31]No doubt the Government would like to see such a rule, as it would allow criminal defendants protection of the speedy trial clause only when they did not need it. (If a defendant prevails on a pre-trial appeal, the case is either dismissed, or evidence that the prosecution needs to go forward remains suppressed.)

4. The Court of Appeals (and the District Court before it) correctly decided the Questions fairly presented. There is no conflict among the circuits.

4. Question One: Whether the Sixth Amendment's Speedy Trial Clause protects a defendant who is an appellee in an on-going pre-trial appeal filed by the Government as part of its effort to try, convict and incarcerate him or her.

The Court of Appeals properly found that, during the Government's appeal of the dismissal orders, defendants were protected by the Speedy Trial Clause.

The Court rejected the Government's contention that MacDonald, supra, required holding that whenever charges are dismissed over the Government's objection, the defendant-appellee is no longer "accused." The ammunition for the refutation of the Government's position is in MacDonald itself.

In MacDonald the Government moved to dismiss an indictment pursuant to FRCrP 48(a). Thereafter Dr. MacDonald was a free man, until the result of further investigation was the decision to bring forth a new indictment. Once the Government formally dropped the charges, MacDonald was "in the same position as any other subject of a criminal investigation." MacDonald, supra, 456 U.S. 8-9.

The Court correctly found that the circumstances facing defendants in this case were the antithesis of those that confronted Mr. MacDonald. The Government removed the stigma of formal accusation when it dropped the charges against MacDonald. As the branch of Government that is charged with enforcing the laws, the executive let it be known that it was not presently prepared to prove that MacDonald had violated any laws. The major evil protected against by the speedy trial guarantee--formal accusation--was no longer a concern. (App. 9a)

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Not for one instant in the last decade has the Government relented from its formal accusation of Respondents. As the Court found:

> The public accusation in this case clearly maintained its force while the government prosecuted appeals in order to reinstate charges against the defendants. The appeals unequivocally stated the government's intention to continue the prosecution and asserted its legal grounds for doing so.

(Id., at 9a).

When the Government voluntarily dismissed the charges against MacDonald, it was willing for him to be a free man. When the Government suffered a dismissal in this case in 1976, it requested the District Court to impose bail restrictions.[32] That request came weeks after Respondents were released from custody over the strong objection of the Government, which responded by the highly prejudicial designation of Respondents as "high risk," a designation the Government has never moved to rescind. (CR 63)

After the Rule 48(a) dismissal in MacDonald, he was no longer named as a defendant in on-going litigation designed to bring him to trial on criminal charges. Not so with Respondents. MacDonald did not need counsel to argue before any court that his case was properly dismissed. Not so for Respondents.

Additionally, a recipient of a Rule 48(a) dismissal has his or her criminal charges resolved at least temporarily, and can count on the protection of any applicable statute of limitations to put a time limit on the Government's ability to change its mind and renew charges. Respondents have no such

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[32]Obviously, when the Government obtains a FRCrP 48(a) dismissal, "the prosecution shall thereupon terminate," and thus no release restriction can be imposed. In contrast, 18 U.S.C. §3731 and §3146 not only authorize bail for an appellee of an involuntary dismissal, but also refer to the appellee as a "defendant" and a "person charged with offense."

Likewise, when a 48(a) dismissal occurs, there is no case pending, so the Government cannot issue subpoenas for a non-existent proceeding. In this case, the Government moved both the District and Circuit Courts to keep its trial subpoenas alive pending appeal. (CR-R-274, CR-R-281, CR-R-289)

protection, both because the Government does not have to change its mind about prosecuting them, and because the statute of limitations does not apply to an on-going case.[33, 34]

The Government must go back to the Grand Jury and make a showing of facts pertaining to a defendant's alleged illegal activities in order to renew a case dismissed on its own motion. Here, it need only convince one court that another court made a legal error.[35] If the Government succeeds here, it can get its old indictment back, whereas it must begin anew after a voluntary dismissal.

Once the Government files its notice of appeal from a dismissal with prejudice, the dismissal is, in effect, stayed. Unlike the 48(a) dismissal, it can be reversed---and that reversal and reinstatement is the exact object of the appeal. App. 9a-10a, 126a-130a).

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[33]The Government's position that this case was terminated with the 1976 dismissal order is in contrast to its contention that the electronic surveillance motion has been pending for seven years (during which time the Government was admittedly dilatory). See: RT 3/10/83 at 3.

[34]One of the logical underpinnings of MacDonald is the policy consideration that the Government should not feel that it has to keep charges pending against an individual when it may not think it can prove them. It is better to reduce the anxiety of the citizen by a voluntary dismissal until and unless the Government has its case all put together; and, conversely, having no fear of a running clock, the Government will be less likely to continue prosecuting weak cases, thus clearing up some court congestion and shielding its investigations from the speedy trial clock. See: United States v. Hillegas, 578 F.2d 453, 460 (2nd Cir., 1978); United States v. Lara, 520 F.2d 460, 466 (D.C. Cir., 1975) (Wilkey, concurring); United States v. Lovasco, 431 U.S. 783, 791-792 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); United States v. Walker, 601 F.2d 1052 (9th Cir., 1979); Casenote: MacDonald, 114 St. Mary's Law Journal 113, 125 (1982).

Such considerations play no part where the Government opposes dismissal, has completed its investigation, and wants the whole world to know that it wants to try and to convict the defendants. The stigma of formal accusation remains, and the charges are still not finally resolved. See Casenote: MacDonald, supra, at 123.

[35]When Judge Belloni dismissed the indictment he stated: "Inasmuch as I have power to do so, this dismissal of the indictment is with prejudice, unless the Ninth Circuit decides otherwise and remands the case or some part of it for trial." (RT 5/12/76, p. 8)

The Ninth Circuit in Loud Hawk gave effect to this Court's holding in MacDonald. The cases cited by the Government do not support its contrary contention.[36] Klopfer v. North Carolina, supra, involved a defendant who--like respondents and unlike the recipient of a 48(a) dismissal--had no protection from a statute of limitations. North Carolina's chief prosecutor was not vigorously and publically pursuing his case against Klopfer, and was certainly refraining from making public statements suggesting that "if [he] had been [part of] a gang of bank robbers, [he] would have been in jail a long time ago." (RT 8/5/80 at 111) Klopfer, like MacDonald, had the freedom to go wherever he wanted without restriction. Respondents, regardless of the ultimate ruling on the dismissal issue, always knew that they could be hauled back into Court and be required to post bail while the case was on appeal.

United States v. Bishton, 463 F. 2d 887 (D.C. Cir., 1972) provides support for the Loud Hawk panel's conclusion. In that case a defendant's motion to dismiss was allowed, and a Government appeal ensued. Nine months later the District Court dismissal was affirmed. Three months thereafter the Government reindicted. The Court referred to the three month interval between affirmance of dismissal and reindictment as "the period between the end of one prosecution and the beginning of another * * * [during which] he 'suffers no restraint on his liberty and is not the subject of public accusation.'" 463 F.2d at 891. The Court therefore held that the first prosecution was not at an end until the Court of Appeals affirmed the District Court's dismissal.

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[36]The Government's reliance on Arnold v. McCarthy, 566 F.2d 1377 (9th Cir., 1978) is totally misplaced. Arnold was not "accused" during a dismissal because the Government moved for the dismissal. The same holds true for United States v. Samples, 713 F.2d 298 (7th Cir., 1983). In neither case were there possibilities of restriction under a dismissed indictment, and in both cases the Government had willingly put itself in a position of having to obtain a new indictment in order to proceed.

It is not surprising, therefore, that this section of Bishton is specifically referred to by the MacDonald Court. 456 U.S at 8, fn.7. After the dismissal was affirmed, there could be no restrictions imposed on Bishton's freedom, and he was no longer formally accused. As if he had been the beneficiary of a Rule 48(a) dismissal, Biston was no longer a party to any proceeding designed to bring him to trial on a criminal charge. However, the prosecution was still active before the affirmance of the dismissal. He was afforded the protection of the Sixth Amendment during the Government's appeal as he stood accused.

Petitioner seems to realize the weakness of its argument. It proposes a factual distinction to claim that these particular Respondents were not accused: the allegation that, while severe restraints could have been placed on defendants, they were not subject to "actual" restrictions. (App. 13-14). Apparently in recognition that the Sixth Amendment protects not only those subject to restraints (which Respondents were), but all those officially accused, it asserts that the "government's appeals exposed respondents to the same 'public obloquy, stress and anxiety' that would have been caused by any public knowledge of the government's interest in or consideration of criminal charges against them." (Id., at 16)

What kind of fiction is it that pretends that a decade long uninterrupted and unrelenting Government effort to incarcerate Respondents causes the same "public obloquy, stress and anxiety" as "any public knowledge of the government's interest in or consideration of criminal charges against them?" And even if the stresses can be compared, at least the statute of limitations would provide a time limit for the stress of a suspect. As the charges against Respondents have a five-year statute of limitations, their stress is only a few months away from entering triple-overtime.

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During this nearly ten-year pre-trial period, Respondents have never been totally free of restrictions. The Government had opposed their release from jail in 1976. When they were released the Government designated them "high risk." When the case was dismissed because the Government refused to give them their trial, bail restrictions were sought, in effect an admission by the Government that the prosecution continued. It now takes a contrary position, as suits its compulsive purpose. The District Court knew that Respondents wanted to go to trial, and would have to keep contact with counsel while the case was on appeal. Respondents behaviour and readiness for trial convinced the Court to deny the Government's request.

However, the fact is that even the Government has characterized the history of this case as "acrimonious" (CR-R-74) (See also: App. 35a). Respondents have always been aware that one false step and they would be dragged back to the District Court arguing against a Government request for bail. This is an advocacy of mindboggling public policy for the Government to insist that the Sixth Amendment only affords protection to those pre-trial appellees who break the law or otherwise give cause for the imposition of tougher release restriction during appeal.[37] Its argument does not square with

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[37]The Government's argument, were it to prevail, would create a most anomalous situtation. District Judges might impose bail restrictions on people they would fully intend to release so that the individual would be protected under the Sixth Amendment in the the event that the Government's appeal of the dismissal order took an inordinate amount of time.

Indeed, if the Government had not contumaciously refused to proceed to trial in 1976 on the gun counts, there would have been no dismissal of the dynamite counts. The proceedings in District Court on those charges would have been stayed, and this case would not have been in a dismissal posture. To find no Sixth Amendment protection under these circumstances would be to reward the Government for creating unnecessary delay.

It would be a most strained reading of Barker to punish defendants who are given a release status concomitant with their strong desire to appear at a trial while rewarding a Government that wrongfully refused to proceed to trial.

the policies of the Bail Reform Act of 1984 in general (18 U.S.C. §3141-3151), or with section 3143, which holds that in situations where the Government has taken an appeal from a dismissal, the defendant is to be treated as any other defendant still awaiting trial.

The Court of Appeals correctly found that Respondents were "subject to the imposition of . . . restraints at any time. Their freedom was far more precarious than that of a person merely subject to investigation but not indicted." (App. 9a)

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family, all his witnesses had died, and the Government's witnesses memories had evaporated[38], he could not complain because the interlocutory appeal time did not "count," and thus Barker is not triggered.

The most obvious problem with this argument is that it elevates the Government's appeal rights to a position superior to that of a constitutional guarantee. As the Court stated in United States v. Wilson, 420 U.S. 332, 337, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975): "Congress intended to remove all statutory barriers to Governmental appeals and to allow appeals whenever the Constitution would permit." [emphasis added] Rather than recognize that the Courts are a branch of Government that owe a defendant a speedy trial[39], Petitioner seeks to remove the protection of the Sixth Amendment and have criminal defendants assume all the burdens of Governmental delay.

This Court noted in Klopfer, supra at 386 US 223, that the earliest codification of the speedy trial right is from the Assize of Clarendon (1166). That document clearly put the burden of speedy trials on both the executive and judicial branches, and there is no reason to depart from that long-standing acknowledgement.[40]

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[38]Thus rendering the right of confruntation meaningless.

[39]The District Court, in rejecting this same Government argument, noted that "[t]he federal government as a whole--executive, judicial, and legislative--is governed by the strictures of the Speedy Trial Clause. All three branches of government have a duty to insure that rights of criminal defendants to speedy trials are not abrogated. Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) (Brennan, J., concurring)." App at 133a-134a. See also: United States v. Fox, 3 Mon. 512 (1880); Cain v. Smith, 686 F.2d 374 (5th Cir., 1983); People v. Johnson, 162 Cal. Rptr. 431, 606 P.2d 738 (1980) (In Bank); United States v. Blanca Perez, 310 F. Supp 550 (S.D.N.Y., 1970); United States v. Perry, 353 F. Supp 1235 (D.C. Cir., 1973); United States v. Kojima, 3 Haw. 383 (1909); Petition of Provoo, 17 F.R.D. 183 (1955)

[40]"4. And when a robber or murderer or thief or receiver of them has been arrested through the aforesaid oath, if the justices are not about to come speedily enough into the country where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices." 386 U.S. 223, fn. 9, citing 2 English Historical Documents 408 (1953).

When the Government suggests that "the 'deliberate pace' of the criminal process is, with good reason, especially unhurried at the appellate stage," (Petition for Certiorari at 17) it ignores the requirement that the Courts provide a defendant a speedy trial.[41] It is, of course, reasonable for review of an issue on appeal to take longer than to decide the same issue in a trial court. However, nowhere does the Government suggest why the Barker balancing test is incapable of weighing this obvious fact.

The mark is widely missed when the Government asserts that "it would make little sense to require the appellate process proceed with the speed required by the Sixth Amendment." Petition for Certiorari at 18. Unlike the Speedy Trial Act, there are no "speed limits" for pre-trial appeal under the Sixth Amendment. The Constitutional provision only prohibits speed so slow that, on balance, the "basic rule" is violated.[42]

The Loud Hawk court recognized that when either the Government or a defendant has a right to a pre-trial appeal,[43] that right should be exercised with the expectation that necessary and reasonable delays will occur. If the appellate courts act as expeditiously as they should, the resulting delay will be justified and not result in a Sixth Amendment violation. On the other hand, when unjustified delay results,

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[41]"[T]he rule we announce today, which comports with constitutional priciples, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial. Barker, supra, 407 U.S. at 529.

[42]As U.S. Attorney Charles Turner has observed, "Every case has to meet both standards. You can never escape the Constitution." THE OREGONIAN, "In Banks Case Wheels of Justice Grinding Slowly," February 1, 1985.

[43]The Government cites Doescher v. Estelle, 454 F. Supp. 943 (N.D. Tex., 1978), United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); United States v. Bizzard, 674 F.2d 1382, (11th Cir.), cert. denied, 459 U.S. 973 (1982), United States v. Hill, 622 F.2d 900 (5th Cir., 1980), Dandridge v. United States, 265 F.2d 349 (D.C. Cir., 1959), Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20

it is possible and proper for the Barker balance to find a constitutional deprivation.

One cannot expect a pre-trial defendant to wait forever for an appeal to be concluded without having his or her right to a speedy trial violated. This Court, in Barker, stated that "a justified reason . . . should serve to justify appropriate delay." 407 U.S. at 531 [emphasis added]. If we can concede that, as a matter of law, a twenty-five year delay would be inappropriate for an "expedited" pre-trial appeal, then we must allow a trial court, as in Loud Hawk, to use his or her discretion and determine whether a six year and three month delay was or was not appropriate, based on the record and the reasons set for by the Government to attempt to justify that delay. Indeed, other Courts have done just that, and concluded that appellate review did become unjustifiably long. Atkins v. People of the State of Michigan, 644 F.2d 543 (6th Cir., 1981), cert. denied, 452 U.S. 964; Chism v. Koehler, 392 F. Supp. 659 (W.D. Mich., 1975), aff'd, 527 F.2d 612 (6th Cir., 1976), cert. denied, 425 U.S. 944, 96 S.Ct. 1868, 48 L.Ed.2d 188 (1976). See also: United States v. Bailey, 399 F. Supp. 526 (M.D. Fl., 1975); United States v. Perry, supra.

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[43](continued) L.Ed.2d 1047 (1968) and In re Williams, 393 N.E.2d 353 (Mass., 1979) for the propositions that:

1) There is no Sixth Amendment right to a speedy appeal;

2) Time consumed on defendants' appeals does not count toward the length of delay for purposes of the Speedy Trial Clause; and

3) These cases, when contrasted with Loud Hawk create a "conflict over the proper treatment of time attributable to defendants' appeals. . ." Petition for Certiorari at 18, 24.

All these contentions are completely meritless. All the cases cited are totally distinguishable by the fact that they consider post-trial, post-conviction appeals. In those cases defendants have had their trial, been convicted, and no longer are presumed innocent. If they were restricted in any way or subject to public accusation, it is because they have had their day in court and have had judgement entered. Respondents are presumed innocent, have never been convicted, and have yet to have their trial, speedy or otherwise.

The Government tries to create the impression that there is a split among the Circuits regarding whether pre-trial appellate time should "count." A brief examination of the cases belies that contention.

In United States v. Jackson, 508 F.2d 1001 (7th Cir., 1975) the District Court found a speedy trial violation, but based that conclusion on "the length of delay between indictments and disposition on the merits has been and will be unreasonable." 508 F.2d at 1005 [emphasis added] Thus, the Court found a speedy trial violation based in part on consideration of delay which had yet to occur. Such an analysis would in fact deny the Government its right to appeal, and would be improper.

The court of appeals then considered the speedy trial claim as of the date of dismissal Id., at 1005. This is no more nor less than what the Loud Hawk panel did. App. at 11a, fn. 4. Jackson does not stand for the proposition that any and all delay attendant to a Government appeal is proper; rather, it holds that that delay cannot be prospectively factored into the balance.

United States v. Bishton, supra, is of questioned vitality on this issue as it predates Barker as the Government concedes (Petition for Certiorari at 21, fn. 17). Citing a draft A.B.A. project, the Court stated that time spent on appeals "is not generally included [in its Standards Relating to Speedy Trial] for purposes of calculating the period of delay in prosecution." 463 F.2d at 890. Yet, the Court recognized that "Courts, of course, are not excluded from the obligation to give defendants a speedy trial," and noted that "delay caused by appeals by the Government [can] constitute denial of a defendant's right to speedy trial." Ibid.

It held that "[w]henever the Government's action at any stage of the proceeding indicates bad faith, neglect, or a purpose to secure delay itself or some other procedural advantage, the resulting delay is not justified." Ibid. This holding that an improper Government appeal can result in

unjustifed delay does not extend to its converse--namely, a ruling that a good faith appeal can go on forever without abridging the right to a speedy trial. Further, the recognition that the delay attendant on an improper appeal can impact the Sixth Amendment compels the conclusion that all appellate delay must be counted. Barker looks to the length of delay rather than the reason for delay as a triggering mechanism.[44]

The remaining cases cited by the Government clearly support the proposition that time on appeal is to be counted. The Government's contention otherwise is without support, and thus there is no conflict to be resolved. See United States v. Herman, 576 F.2d 1139, 1145 (5th Cir., 1978) ("Most of the delay . . . resulted from the government's . . appeal.");[45] United States v. Litton Systems, Inc., supra. ("There is nothing speedy about a five year delay [which included time on appeal]"); United States v. Sebastian, 428 F. Supp. 967, 975 (W.D.N.Y.), aff'd, 562 F.2d 211 (2nd Cir., 1977) ("A great bulk

[44]The Government admits that in D.C. Circuit cases decided after Barker appellate delay has been counted. Petition for Certiorari at 21-22, fn. 17, citing Perry, supra, Brown, supra, United States v. Sarvis, 523 F.2d 1177 (D.C. Cir., 1975) and United States v. Rosenbloom, 511 F.2d 777 (D.C. Cir., 1974).

[45]Interestingly, in Herman the Government tried to get the Court to remove from the length of delay consideration the time between Herman's arrest and his withdrawal of a guilty plea. The Court's response is instructive:

> The government urges us to charge the time between arrest and Herman's withdrawal of his guilty plea to Herman. This procedure is mandated for cases arising under the Speedy Trial Act, 18 U.S.C. §3161(i). We are not sure, however, that artificially shortening the length of delay would be appropriate in every case arising under the constitutional guarantee. . . The analysis mandated by Barker v. Wingo allows us to examine the reasons for the delay and to excuse any delay that the defendant himself causes.

576 F.2d at 1145, fn. 4.

of the delay occurred . . . because of the Government's appeal of this court's suppression ruling."); State v. Helenbolt, 334 N.W.2d 400, 405 (Minn., 1983) ("[Under] Barker v. Wingo • • • the state's appeal and concomitant [eight month] delay were justified." [emphasis added]); Atkins v. People of the State of Michigan, 644 F.2d 543, 548 (6th Cir., 1981), cert. denied, 452 U.S. 964 ("The length of time involved here--fifteen months from arrest to decision by the state Court of Appeals on the interlocutory order--unquestionably is sufficient to trigger a speedy trial claim."); Chism v. Koehler, 392 F. Supp. 659 (W.D. Mich., 1975), aff'd, 527 F.2d 612, 663 (6th Cir., 1976), cert. denied, 425 U.S. 944, 96 S.Ct. 1868, 48 L.Ed.2d 188 (1976) ("[R]espondent admits that the twenty-seven month delay between arrest and trial [most of which was on defendant's interlocutory appeal] is sufficient to raise the issue."); Day v. United States, 390 A.2d 957 (D.C., 1978) ("[I]n calculating the length of delay the motions judge erred in excluding 18 1/2 months of interlocutory appeal time from the 32 1/2-month period between arrest and trial.") See also: United States v. Cox, 475 F.2d 837, 841 (9th Cir., 1973) and United States v. Osuna-Sanchez, 446 F.2d 566, 567 (9th Cir., 1971), cert. denied, 404 U.S. 1022, 92 S.Ct. 698, 30 L.Ed.2d 672 (1972).

C. Question Three: Whether every time a suppression order is entered against the Government with respect to only one part of a criminal case, the Government can contumaciously refuse to proceed to trial on the uneffected counts after being denied a stay by both the trial and appellate benches, and suffer no consequence under Barker v. Wingo for such recalcitrance.

As the previous section indicated, appellate time is counted in determining the length of the delay before trial during which a defendant is protected by the Sixth Amendment. To hold otherwise would be to allow a case to take forever before proceeding to trial, and to rule that Courts do not have any obligation to provide a speedy trial.[46] Cf. Barker, supra, 407 U.S. at 529. Appellate delay, if justified, "should serve to justify appropriate delay." Barker, supra, 407 U.S. at 531 [emphasis added].

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[46]In fact, the Government's argument that to count delay on appeal denies its rights under 18 U.S.C. §3731 has an interesting parallel if applied to the trial courts. Problems beyond the Government's control and other unexplained delay can result in denying the Government its right to bring a person charged with violating the law to trial. Certainly the right to appeal is no stronger than the right to try people indicted by the grand jury. Yet, unexplained delay weighs against the Government. See: Barker, supra, 407 US, at 531 (overcrowded dockets); United States v. Brown, 600 F.2d 248, 254 (10th Cir., 1979), cert. denied 444 US 917 (ill judge and overcrowded docket); United States v. Grismore, 564 F.2d 929, 932 (10th Cir., 1977), cert. denied 435 US 954 (difficulty in getting a judge); United States v. Macino, 486 F.2d 750, 753 (7th Cir., 1973) (unjustified delay, assumed to be from negligence or understaffed prosecutor's office); United States v. Jenkins, 701 F.2d 850, 857 (8th Cir., 1983) (overcrowded dockets and difficulty in getting a judge); Strunk v. United States, supra, 412 US 434, 436, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973) (unintentional delays, overcrowded court dockets, or understaffed prosecutor's office); United States v. Tercero, 640 F.2d 190, 194 (9th Cir., 1980), cert. denied 449 US 1084 (stipulation between defense counsel and prosecutor to set over case pending another criminal prosecution); United States v. Vispi, 545 F.2d 328, 334 (2nd Cir., 1976) (judge's inaction); Atkins v. People of the State of Michigan, supra, at 548 (11 month interlocutory appeal); United States v. Bailey, supra, 399 F. Supp. 526, 530, (M.D.Fl., 1975) (lack of judges); United States v. Bowman, 493 F.2d 594, 597 (2nd Cir., 1974) (2nd Circuit Rules violated--understaffed prosecutor's office); Cain v. Smith, supra, 686 F.2d 374 (5th Cir., 1982) at 382 (unexplained delay; delay resulting from jury's observation of defendant who was shackled or wearing jail garb); United States v. Carini, 562 F.2d 144, 149 (2nd Cir., 1977) (judicial illness, summer recess, unexplained inaction, overloaded docket, judicial disqualification, judicial vacancies); Chism, F. Supp., supra. at 655 ("lamentable" twenty-seven month appeal); Dufield v. Perrin, 470 F. Supp. 687, 690 (D.N.H., 1979) (overcrowded dockets, judicial understaffing); Jones v. Morris, 590 F.2d 684, 686 (7th Cir., 1979) cert. denied 440 US 965 (lack of reason); United States v. Latimer, 511 F.2d 498, 501 (no reason shown, overcrowded dockets); United States v. Sarvis, 523 F.2d 1177,

The Government takes its meritless argument one step further in footnote 16 of its Petition for Certiorari (at p. 19). It incredibly seeks to exclude from the length of delay the time necessary to appeal the dismissal entered because the Government's unnecessary delay in proceeding to trial in 1976.[47]

Judge Belloni had suppressed evidence that was material to only part of the Government's case. The Government had no right to appeal the suppression as to the uneffected counts. Respondents wanted to go to trial. The District Court refused to grant a continuance. The Court of Appeals refused to issue a stay. Every court that has ever had occasion to review this case has held that the Government was responsible for

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[46](continued) 1182 (D.C. Cir., 1975) (appellate delay); United States v. Calloway, 505 F.2d 311, 316 (D.C. Cir., 1974) (delay in filing report of mental examination, "deliberate pace of system."); Hanrahan v. United States, 348 F.2d 363, 368 n. 16 (D.C. Cir., 1965), cert. denied 389 US 845 (ineffective court adminstration); United States v. Lane, 561 F.2d 1075, 1079 (2nd Cir., 1977) (unavailability of replacement for ill judge).

It should further be noted that a series of reasonable delays can accumulate to become one unreasonable delay. Chism, F. Supp. supra, at 667.

[47]The only favorable thing that the Government can say about its violation of the Orders of two Courts in refusing to proceed to trial is that that decision was made "in good faith." Without conceding that point for an instant, one can only view with incredulity the argument that delays not resulting from bad faith actions of the Government are not cognizable under the Sixth Amendment. The citation to United States ex rel. Mitchell v. Fairman, 750 F.2d 806 (7th Cir., 1984) offers no support for this absurd assertion. (Therein the Court, of course, counted the appellate time, but found that it was explained. 750 F.2d at 809.) Nor does the citation to United States v. Sointil, 705 F.2d 415 (11th Cir., 1983), wherein delay was counted and weighed against the Government.

Furthermore, the assertion that the "firearms counts had not been severed from the dynamite counts--[and therefore] the government would have had to go to trial on all counts, thereby losing its right to appeal the suppression order" is patently ridiculous. (Petition for Certiorari p. 19, fn. 16) The suppression order had nothing to do with the gun counts. Those counts were unsevered because the Government was unwilling to have them severed.

unnecessary delay. To exempt such clearly unjustifiable delay from Sixth Amendment scrutiny, as the Government proposes, would create a frightening rule. The Government would be able to contumaciously ignore Court Orders designed to avoid unnecessary delay and unwarranted appellate proceedings, and suffer no consequence under Barker v. Wingo.[48]

This Court need not grant Certiorari in order to reject the Government's frivolous and unsupportable proposition.

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[48]Like an unrepentant lawbreaker the Government feels elated by its thus far successful effort to avoid the consequences of its actions. It irresponsibly refused to obey Orders of two Courts, was found to have created wholly unnecessary delay, had the dismissal of the gun counts sustained, and yet refers to its appeal as "successful."

In fact, one can presume that at least some of the four year delay in the first appeal was associated with examination of the Government's improper refusal to proceed to trial nine years ago. It would not be too farfetched to assert that, with a trial on the firearms counts completed in May 1976 and a simpler appeal, this case would never have reached such an aged state. In fact, had the Government proceeded on the firearms counts in 1976, there would not have been any need to resubmit them to the grand jury, no vindictive-appearing indictment would have been returned in 1980, and the second appeal would not have existed.

D. Question Four: Whether the appellate court erred in upholding the the District Court's use of discretion in sustaining a speedy trial violation by applying the analysis of Barker v. Wingo to the unique facts of this decade old case.

The Court of Appeals did not err in upholding the District Court's conclusion that Respondents' rights to a speedy trial had been violated.

i) LENGTH OF DELAY.

As the discussion of the Questions Presented, supra, demonstrated, the Circuit Court was correct in calculating "the delay in this case as ninety months, the period from the arrest of defendants until their indictment was last dismissed on May 20, 1983." App. at 11a. Clearly this delay was sufficient to "trigger" further inquiry.

ii) REASONS FOR THE DELAY.

Barker, supra, defines how to weigh the reasons for any particular delay in the balance of factors:

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibilty for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

407 U.S. at 531. The Circuit Court weighed the reasons for delay as follows:

For the first pre-trial appeal it separated the dynamite and non-dynamite counts. It concluded that the delay attendant on appeal of the latter was "wholly unnecessary" and weighed "heavily" against the Government. As discussed above, there was no other conclusion at which the Court could have arrived.[49]

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[49]Note again that the Government suggests that all appellate time be excluded as it "prevailed on those appeals." Since when does a decision upholding a dismissal because of unwarranted and unnecessary Government delay constitute exoneration?

As to the dynamite counts, the Court properly found that "[t]he Government's action in taking the appeal was therefore clearly justified, and would of itself support a reasonable delay. The problem is that this appeal took forty-six months." App. at 13a. The Court's analysis followed Barker to a tee. It first determined that the reason for the delay was justifiable (a proper Government appeal). It then "related [the] length of delay [to] the reason . . . assign[ed] to justify the delay." It did so knowing that "a valid reason . . should serve to justify appropriate delay." Barker, supra, 407 U.S. at 531.

Although a shorter perioo of time might have been found justifiable for a pre-trial, "expedited" appeal, clearly a nearly four year delay was not "appropriate," or justified. Such delay falls into the "neutral" Barker pigeonhole, and thus weighs against the Government, but less heavily. App. at 13a.

The delay attendant to the second appeal was considered justified by the Court of Appeals. It further found that six months of delay were the fault of Respondents, and thus balanced the reason for the delay against a period of twenty-three instead of against twenty-nine months. As it considered a twenty-three month period for a pre-trial interlocutory appeal to be not "undue," it found that the reason for the delay justified the length of delay, and therefore did not weigh this factor in the balance.[50] App. at 15a.

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[50]Although Respondents find no fault with the analytical approach of the Circuit Court to the delay of the second pre-trial appeal, we do have serious problems with its conclusions.

In reviewing the District Court's opinion, the Circuit Court should have employed a standard of "clearly erroneous" to any pure or mixed findings of fact (United States v. Hart, 546 F.2d 798, 801-802 (9th Cir., 1976). Further, as each speedy trial case is ad hoc and requires the District judge to exercise discretion, it should have employed an "abuse of discretion" standard. (United States v. Mills, 641 F.2d 785, 787 (9th Cir., 1981), cert. denied, 454 U.S. 902, 102 S.Ct. 409; United States v. Simmons, 536 F.2d 827, 832 (9th Cir., 1976), cert. denied, 429 U.S. 824) Instead it substituted its own judgement.

The Government criticizes the Court, suggesting without any authority, that "the time spent on respondents' own unsuccessful interlocutory appeal must, on any reasonable analysis, weigh heavily against them." Petition for Certiorari at 25. At the time defendants filed their appeal, they not only had a right to appeal, but made an excellent claim under the then existing case law. App. 32a fn. 4. Cf. United States v. Hollywood Motor Car Co., 458 U.S. 263, 102 S. Ct. 3081, 73 L.Ed.2d 754 (1982), United States v. Goodwin, 102 S. Ct. 2485 (1982). Just as the Government's right to appeal deserves protection by affording it an appropriate amount of time to be asserted, a defendant's rights are entitled to protection too.

Either side to a law suit must be permitted to make a good faith assertion of its rights (whether it ultimately prevails or not). A certain amount of delay must be expected and tolerated by the litigants when one side or the other properly exercises any of its rights which necessarily delay the proceedings. It is when that expected and tolerable quantum of delay becomes unjustified and inappropriate that it acquires weight under the "reason for delay" factor.[51]

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[50](continued) Respondents obviously believe that the District Court was correct in concluding that the period of delay was twenty-nine months, and that the reason for the delay (proper pre-trial appellate procedures employed by each side) did not serve to justify that length of delay, especially as this appeal was also "expedited." Judge Redden properly weighed that twenty month period against the Government as a "neutral" reason. App. at 131a-132a.

However, Respondents' disagreement with the Circuit Court here is inconsequential, as the great weight of the Government's improper appeal, combined with the totally unjustifiable length of the first pre-trial proceeding, compelled the Court to the correct result. It found that the "reason for delay" factor, even absent the weighing of what Respondents believe was further unjustified delay, "contribute[s] . . . to our conclusion that defendants' speedy trial rights have been violated in this case."

[51]Before the first appeal began nearly nine years ago, the Government asserted that an appropriate delay for an "expedited" pre-trial appellate proceeding would be one of a "matter of months." (Cr-140)

iii) ASSERTION OF THE RIGHT.

More than by anything else, the antique nature of this law suit is revealed by the blatant lie put forth by the Government that Respondents did not want a speedy trial. This case is so old that a revisionist history is already being written.

To "support" this incredible claim, the Government faults defendants for asking for a few short trial court continuances. Petition for Certiorari at pps. 26-27. As indicated above, the continuances were sought either to allow all defendants to be tried together, or to allow time for defense investigative efforts, stymied by the Government's outrageous instruction to witnesses to refrain from talking with the defense.

The Government further suggests, Petition for Certiorari at pps. 26-27, that vigorous defense representation in an attempt to secure relief for gross governmental misconduct and other transgressions of defendants' statutory and constitutional rights is inconsistent with an assertion of a right to a speedy trial. Where is there authority or reason to suggest that in order to demand a speedy trial well founded motions and petitions should not be filed? What is the inconsistency between wanting a dismissal of the charges (or suppression of evidence)[52] when there are grounds for such relief, and a speedy trial too? The only reason for such hysterical and unreasonable arguments from the Government is its recognition of both the powerful weight given to a speedy trial demand in the Barker balance, and the strength with which Respondents have asserted that demand.

The Government's citations to Barker and Litton are directly on point. Both cases affirmatively demonstrated the great weight the Barker scales provide to a defendant's desire

[52]The Government asserts that the decision of Respondents Dennis Banks, Loud Hawk, and Redner to seek Certiorari from the second appeal reflects a desire to avoid trial. Rather, it evidenced a desire to avoid severance of defendants and relinquishment of claims under authority of this Court's decisions against piecemeal litigation.

to have a speedy trial. Barker waited five years for his trial, but his right to a speedy trial was not abridged because he did not want one. 407 U.S. at 534-536. Litton "sought delay . . . from the inception of this litigation," and thus could not complain about a five year delay. 722 F.2d at 271. Knowing that all other factors weigh against it, (App. at 18a) the Government is engaging in a desperate attempt to save its case with an unmitigated fiction.

Fortunately, this crass attempt to blame the victim cannot succeed, as the defendants' desire to have a speedy trial and the prosecution's dilatory tactics are well documented. No court has ever charged defendants with seeking delay; every court that has ever had the opportunity to rule on the Government's irresponsible refusal to proceed to trial (despite denial of a request for stay by both trial and appellate benches) has laid reponsibility for unnecessary delay at the U.S. Attorney's doorstep. Even Judge Wallace in dissent agreed with the majority and with Judge Redden that Respondents wanted a speedy trial. (App. 24a)

Three of the four Respondents were incarcerated from November, 1975 until February, 1976. Their demands for release, bitterly opposed by the Government, were alternative means of asserting a speedy trial demand. Cain v. Smith, 686 F.2d 374, 384 (5th Cir., 1982); United States v. Calloway, 505 F.2d 311, 316 (D.C. Cir., 1974). Once out of custody (as "high risk" designees) defendants were busy organizing their defense in anticipation of trial. (See attachments to CR 138) Less than three weeks before the trial date they petitioned the Court to hold the trial "in a facility sufficiently large to accomodate a reasonable number of members of the general public" as this case had attracted national attention and Indian people were coming to attend from all over the country. CR 132. As far as the defendants were concerned, the Government's case against them was riddled with misconduct and racism, and the Government knew that defendants were eager to put those charges before a jury. It truly seems like a

lifetime ago, but a present-day elementary school principal named Russ Redner, in seeking release before trial, stated:

> I'd like to say that we intend to stay here. We do intend to stay here and deal with this matter; we have intended to do so from the day -- from the very beginning. We have very little voice in America. Our people make up less than one percent of the total population. So therefore, we have to utilize every opportunity to speak for our people. We face prison as a consequence, but we are still willing and bound by ancestor's blood to carry on and to see this matter through to the end. We're not going to run away from ourselves. We're going to stay and see who is indeed on trial here.
>
> I want to get out on the street. I want my counsel to prove my case that I'm innocent and that the guilt lies with the Government.

RT 12/29/75 pps. 44-45; RT 1/23/76 pps. 51-52.

When the Government requested delay, Respondents opposed it. When the appellate bench was considering the request for a stay, a vigorous objection was filed (Respondents' Appendix at 1a). Nine years after the fact the Government asserts that Respondents did not want a speedy trial, yet only eight days before the May 12, 1976 trial date the Government admitted that "the defendants [and] their counsel . . . desire the case to be tried at the earliest practicable opportunity." CR 136 (FCR 810). On the date set for trial Judge Belloni found that the defendants were ready. RT 5/12/76. After every remand defendants reasserted their claim. (App. 135a)

Clearly, there was no error by either District or Circuit Court giving Respondents' demands for a speedy trial "strong evidentiary weight." Ibid., quoting Barker, supra, 407 U.S. at 531-532.

iv) PREJUDICE.

There are two types of prejudice that are relevant to a speedy trial question: "prejudice to the person and prejudice to the defense." Dufield v. Perrin, 470 F.Supp. 687, 691 (D.N.H., 1979).

Regarding the former, Respondents, all "high risk" designees, have had these unresolved charges hanging above their respective heads like a sword of Damocles for nearly a

decade. The District and Circuit courts both found that Respondents have suffered personal prejudice from the outrageous length of delay. (App. 16a, 136a). As Judge Redden observed: "The Supreme Court has consistently noted the substantial nature of this type of prejudice. MacDonald, supra, 456 U.S. at 8-9, 102 S.Ct at 1502; Barker, supra, 407 U.S. at 533, 92 S.Ct. at 2193; United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)."[53] (App. 136a)

Although a showing of prejudice to the defense is not an essential element of a successful Sixth Amendment claim,[54] Respondents have made such a showing. Based on its knowledge of the record of this case and the affidavits submitted on behalf of Respondents, (CR-R-241, CR-R-242, CR-R-246, CR-R-247) Judge Redden found that material defense witnesses had died, and other material witnesses had lost all recollection of the

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[53] See also: Dickey, supra, 398 U.S. at 54 (J. Brennan, concurring); Dillingham v. United States, 423 U.S. 64, 65, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975); United States v. Haulman, 288 F. Supp. 755, 780 (E.D. Mich., 1968); Klopfer, supra, 386 U.S. at 221-222; Macino, supra, 486 F.2d at 753; Speedy Trial, 20 Stanford Law Review 476 (1968); Note: Speedy Criminal Trial, 27 Stanford Law Review 525, 533 (1975); Blanca Perez, supra, 310 F. Supp. at 552-553; Hoskins v. Wainwright, 485 F.2d 1186, 1188-1189 fn. 3; (5th Cir., 1973); United States v. Zabady, 546 F. Supp. 35, 40 (M.D. Pa., 1982). In fact, this is the type of prejudice that a court can take judicial notice of. United States v. Bailey, 399 F. Supp. 526, 531 (M.D. Fl., 1975)

[54] See Moore v. Arizona, supra, 414 U.S. at 26; MacDonald, supra, 456 U.S. at 8. U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973).

events of November, 1975.[55, 56] The Government had ample opportunity in the District Court to contest Respondents' showing of "obvious" prejudice to the defense. If it truly believed that Respondents were caught "red-handed" (sic!) and could therefore suffer no prejudice, it had every opportunity to present its theory to the District Court; it chose not to do. The bold, self-serving, and unsupported assertions made before this Court are hardly persuasive. This case is almost a decade old--twice the statute of limitations. Prejudice to the defense, which need not be affirmatively demonstrated (but was) can even be presumed. See United States v. Vispi, 545 F.2d 328, 334 fn. 7 (2nd Cir., 1976). See also People v. Johnson, 162 Cal. Rptr. 431, 606 P.2d 738, 749 (1980) (In Bank) and Hodges v. United States, 408 F.2d 543, 550 (8th Cir., 1969).

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[55]These witnesses were ones whose identities were hidden by the Government. Respondents learned of their existence by obtaining police reports from other lawyers on other cases. The reports indicated that these two people had seen the vehicles described by the FBI teletype on November 14, 1975 and been shown "throw downs" days after Respondents' arrest. Both had opportunities to see occupants of the vehicles. None of the Respondents was identified, although two other people were, according to the reports of the officers. These witnesses no longer have any recollection. (App 137a)

[56]A sampling of the other prejudice in the record that the Courts did not mention in their opinion includes: 1) Respondents have been prejudiced by a change in public attitudes. See: CR-R-214; United States v. New Buffalo, 600 F.2d 368, 379 (2nd Cir., 1979); 2) Tape records of calls by material witnesses have been destroyed. See: CR-R-242, Dickey, supra, 398 U.S. at 32, Murray, supra, 450 F.2d at 472; 3) KaMook Banks, who successfully completed probation on an unrelated charge can no longer have the possibility of concurrent sentences if convicted. Dufield, supra, 470 F. Supp. at 691; United States v. Graham, 538 F.2d 261, 265 (9th Cir., 1976); Prince v. State of Alabama, 506 F.2d 693, 707 (5th Cir., 1975) See also United States v. Salzmann, 417 F. Supp. 1139, 1144, 1164, 1168, 1169 (E.D.N.Y., 1976); Smith v. Hooey, supra, 393 U.S. at 378; 4) KaMook Banks and Kenneth Loud Hawk would have been eligible for Youthful Offender treatment and no longer are. United States v. Black, 416 F. Supp. 59, 62 (M.D. Fl., 1976); Salzmann, supra, 417 F. Supp at 1173.
In fact, when a defendant's claim "has prima facie merit, the

Government must make a showing which 'convincingly outweighs' a defendant's assertion of prejudice." Parks v. United States, 451 A.2d 591, 602 (1982).[57, 58]

THE BALANCE

Since each of the Barker factors weighed in support of Respondents' speedy trial assertion, the Circuit Court was correct in sustaining Judge Redden's ORDER finding a Sixth Amendment deprivation.

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[57] See also Day, supra, 390 A. 2d at 970, 1978); United States v. Avalos, 541 F.2d 1100, 1116 (5th Cir., 1976), cert. denied, 430 U.S. 970; United States v. Barket, 530 F.2d 189, 196 (8th Cir., 1976); Dickey, supra, 398 U.S. at 54-55 (J. Brennan, concurring); United States v. Quinn, 540 F.2d 357, 361 (8th Cir., 1976); Blanca Perez, supra, 310 F. Supp at 551; Carini, supra, 562 F.2d at 151; Chism, supra, 392 F. Supp. at 667; Murray, supra, 450 F.2d at 471; New Buffalo, supra, 600 F.2d at 377; Prince, supra, 506 F.2d at 707.

[58]It should be noted that if the indictment in this case is reinstated for whatever reason, Respondents can demonstrate additional prejudice from delay since 1983, and would provide evidence of said prejudice to the District Court in support of a new Motion to Dismiss for Pre-Trial Delay.

5. Should the Court want to consider a case that raises issues of pre-trial appellate delay, Loud Hawk is an inappropriate selection.

This case involves an exceptionally long period of delay, Government creation of unnecessary delay, unexplained delay, inappropriate delay, Government appeals, defense appeals (based on jurisdictional holdings vacated while on appeal), three District Court dismissals, one en banc appellate decision, two panel decisions (one reported and one unreported), Governmental misconduct, and political overtones. Indeed, a case with a more muddied record could not be found. It would provide poor material from which to weave any principle which was not capable of spontaneous unraveling.

6. There exists an independant ground upon which the District Court dismissed the indictment which was not addressed by the appellate court or by the Questions Presented by the Government's Petition for Certiorari.

As the Government noted at page 27, footnote 21 of its Petition for Certiorari, Judge Redden also found a due process violation from the delay. As noted above, the Government did not contest Respondent's factual assertions of prejudice before the District Court. It admits that prejudice exists, ignores the fact that its improper refusal to proceed to trial in 1976 gave birth to all subsequent delay, and suggests without any authority that it would be "appropriate for this Court to rule that there was no due process violation." Id., at 28.

The Government is correct in asserting that Judge Redden's due process dismissal must be considered before the case can be returned yet again to the District Court, and indulging in fantasy by suggesting that the voluminous record of this legal dinosaur does not contain evidence of sufficient prejudice to support Judge Redden's ruling.

It would be absurd for this Court to take upon itself the task of combing through the voluminous record of this case, without the guidance of any prior appellate review, to determine what is, in essence, an issue of fact rather than law.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH SAUL STERN
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Suite 101, Kellogg Building
1935 S.E. Washington
Milwaukie, Oregon 97222
(503) 654-7792

Counsel for Respondent
DENNIS JAMES BANKS
(on behalf of all Respondents)

The assistance of Kathryn Johnston, Esq., Michael E. Rose, Esq., Lisa Martens, Katie Wolk-Stanley, and Virginia Raymond in the production of this BRIEF IN OPPOSITION is greatly appreciated.

EDITOR'S NOTE

PAGES 1a-20a WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA)
)
Appellant,)
)
vs.) No. 76-1906
)
KENNETH MOSES LOUD HAWK,ET AL.) DEFENDANTS' OPPOSITION TO THE GOVERNMENT'S REQUEST FOR A STAY
)
Appelles.)

Defendants respectfully urge this Court to deny the Government's request for a stay of the proceedings in the instant case for the below -stated reasons:

1) The Honorable Robert C. Belloni, Chief Judge of the District Court of Oregon, who has lived with this case since November, 1975 and is familiar with the government's conduct therein, and is therefore, in the best position to evaluate the validity of the government's stance in this matter, has forcefully rejected the government's request for a stay of the proceedings.

2) The affidavit of Sidney Lezak, United States Attorney for the District of Oregon certifies that said appeal"was not taken for the purpose of delay." Yet, in open court on April 26, 1976, Mr. Lezak admitted to Judge Belloni that the government will not be ready to go to trial on May 12, 1976 as earlier agreed, and Mr. Lezak made said statement in the face of Judge Belloni's admonition that such a posture would result in the dismissal of this case.

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3)The government is highly unlikely to succeed in its appeal of the District Court's Order Suppressing Evidence, insp of its contentions to the contrary, given the presumption of validity that must be accorded such suppression order, and give the weakness of the authority upon which the government intends to rely in support of its position. (See attached Memorandum of Points and Authorities.)

4) The Defendants would be highly prejudiced by any stay of the proceedings in that such stay would generally abridge their Sixth Amendment right to a speedy trial, and would cause specific hardship for the following reasons:

a) Defendants have labored under the enormous prejudice of being designated by the Government as high-risk individuals pursuant to 18 U.S.C. 3164, a designation which does violence to the presumption of innocence. Furthermore, such designation applied to them by the Government placed an enormous financial and emotional burden upon all the Defendants and their counsel requiring the preparation of a defense in a highly complex case within ninety days. Defendants have successfully met said burden, including completion of all motions on an extraordinarily tight briefing schedule caused by the government's designation of high risk, and Defendants stand ready for trial on a date mutually agreed upon two months ago by Judge Belloni, defense counsel and counsel for the Government.

b) To comply with the U.S. Attorney's Designation of High Risk, all counsel, including two out-of-state counsel,

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with numerous trial commitments, were forced to re-arrange their schedules, to the inconvenience of several state courts.

c) Pursuant to an order of the Honorable Frank Theis, U.S. District Judge in Kansas, the trial of Ka-Mook Banks, one of the co-defendants in the instant matter, has been trailed pending completion of this case. Bail in that matter was set at $20,000 cash, which bail was posted with considerable hardship to the Defendant, and a stay of the instant case would unnecessarily tie up those bail funds which the Defendant needs to support herself and her two infant children.

d) Finally, Defendant Dennis Banks faces extradition proceedings in both Oregon and in California, on a demand for his return to South Dakota. Defendant Banks has strenuously resisted extradition to that jurisdiction because of direct threats against his life by the highest law enforcement officials of South Dakota. It has been made clear to counsel for Defendant Banks, that both Governors will weigh the final outcome of the instant matter heavily in their deliberations of a case which presents such serious issues. To further delay the trial in which Defendant Banks will be exonerated jeopardizes a favorable resolution of these important state matters.

Therefore, Defendants, for all the above and foregoing reasons, respectfully urge this Court to deny the Government's Request for a Stay.

DATED: April 26, 1976

DENNIS ROBERTS
On Behalf of All of the Defendants

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STATE OF CALIFORNIA
COUNTY OF ALAMEDA

AFFIDAVIT OF DENNIS ROBERTS

DENNIS ROBERTS, after being duly sworn, deposes and says:

That I am the attorney of record for Defendant DENNIS JAMES BANKS, one of the co-defendants in the instant matter, and that I am licensed to practice before the California Supreme Court and this Honorable Court.

That the co-defendants in this case filed formal discovery motions in this matter several months ago. The Assistant United States Attorney with prime responsibility for this matter several days ago advised one of counsel for a co-defendant that all discoverable material in the case had been turned over to the defendants, that no further discoverable material existed and reaffirmed the committment of the Office of the United States Attorney that as said material became available it would be turned over to the defendants and their counsel immediately.

On April 14, 1976 your affiant had a meeting with said Assistant United States Attorney who turned over discovery material and made the same representations.

On April 22, 1976 your affiant received a packet of materials from defense counsel in a federal criminal matter presently under prosecution in South Dakota involving the death of two F.B.I. agents in Oglala, South Dakota. One of the defendants in that case, LEONARD PELTIER, is a co-defendant in the instant matter. Said packet contained some of the discovery turned over to defense counsel in the Oglala case

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by the United States Attorney in that case. Among the items discovery provided therein were items extraordinarily exculpatory of the instant defendants, including, inter alia, the identification of fingerprints of persons other than the instant defendants whose prints were found in the vehicles containing the alleged contraband which is the subject of the instant prosecution, and evidence that handwritten material found in said vehicles could not be favorably compared with handwriting exemplars provided by the defendants from whom exemplars were obtained.

Suppression of the fingerprint evidence, in light of the fact that Defendant DENNIS JAMES BANKS was not present when the vehicles were seized and that the Government's entire case against him is built on the hypothetical that since his prints were found in the vehicle he must have been the person who drove said vehicle a few hundred feet away from the scene, mandates a dismissal for gross governmental misconduct.

The evidence of fingerprints of persons other than defendants being found in said vehicles was transmitted by the F.B.I. Latent Fingerprint Section to Special Agent in Charge (SAC) Portland on January 21, 22 and 26, 1976. The exculpatory handwriting material was transmitted from F.B.I., Washington, D.C. to SAC, Portland on March 12 and 15, 1976. None of this material was ever turned over to the defendants by the Government herein. Said information is presently being prepared in motion form to be presented to Judge Belloni forthwith.

Sworn to and subscribed before me
this 26th day of April, 1976.

Linda S. Willis
NOTARY PUBLIC

DENNIS ROBERTS

OFFICIAL SEAL
LINDA S. WILLIS
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
ALAMEDA COUNTY
My Commission Expires May 12, 1979

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MEMORANDUM OF POINTS AND AUTHORITIES

The Government, according to its Notice of Appeal, intends to rely on three cases, one from the 7th Circuit, U.S. v. Shafer, 445 F2d 379 (7th Cir. 1971) and two from this Circuit, United States v. Trenary, 473 F2d 680 (9th Cir. 1973) and United States v. Sewar 468 F2d 236 (9th Cir. 1972), all of which cases predate this Court's opinion in United States v. Heiden, 508 F2d 898 (9th Cir. 1974), upon which the District Court relied in its Order Suppressing Evidence of March 30, 1976.

All of the above-mentioned cases can be easily distinguished from the case at bar, which involves not only the destruction of all the explosive evidence without retention of even a sample of such evidence (See Order Suppressing Evidence p.6), but also, the totally unjustified destruction of the cardboard boxes and plastic bags within which the explosives were contained, and prior to any attempt, according to the Government, to obtain fingerprints therefrom, although fingerprints were obtained from virtually every surface of the vehicle and its contents in which said explosives were allegedly found. "The destruction of these articles eliminated the possibility that [the Defendants] could have presented evidence rebutting this charge: i.e. they might have been able to show that their fingerprints were not on the dynamite containers." (See Order Suppressing Evidence, hereinafter referred to as Order, p. 4). Furthermore, the destruction of these containers, completely eliminated the possibility that the Defendants could have adduced whose fingerprints might have

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been on said containers. (See affidavit of Dennis Roberts).

United States v. Trenary, supra, is totally inapposite because there the destruction of the evidence was done by foreign officials in Mexico, and not by U.S. government officials. Here, the FBI participated actively in said destruction.

In United States v. Sewar, supra, the inadvertent loss of evidence by a technician who had no reason to realize that the evidence should be preserved for trial, stands in sharp contrast to the findings of the District Court herein. "The officers and agents who were present at and who conducted the destruction of the dynamite and its containers were experienced personnel. They must have known how sensitive this case would become and how material this evidence was to the case." (See Order, pp. 4 & 5).

In United States v. Shafer, supra, the government was not on notice by the 7th Circuit, as was the government in the 9th Circuit, that they are "flirting with danger of reversal any time evidence is lost or inadvertently destroyed." (United States v. Heiden, supra at 903, fn.1). Furthermore, in Shafer, a case not involving the question of constructive possession or the possibility of culpability by persons other than the Defendant, the Court found no concrete prejudice to the defendant who had been given samples of the residue of the destroyed evidence as well as derivative evidence obtained therefrom. "Here, none was saved. Even the wrappers were scraped clean." (See Order, p.6).

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Finally, as regards the unnecessary and totally unexplained destruction of the containers prior to any attempt to obtain fingerprint evidence therefrom and to any "opportunity for defense analysis", Defendants urge that this is a case, not of inadvertent destruction, but rather of intentional non-preservation of highly relevant evidence. "On a spectrum between good faith but inadvertent loss and bad faith destruction ... [the Government's] conduct must lie somewhere in the middle. Perhaps it should lie somewhat closer to the latter end." United States v. Bryant, 439 F2d 642, 647 (1971).

Therefore, for all of the above and foregoing reasons, Defendants urge that the authorities upon which the Government intends to rely and distinguishable on their facts and on the applicable law, and cannot support the certification by the United States Attorney herein, that based upon such authority, the Government's chances of succeeding are great.

DATED: April 26, 1976

Respectfully submitted,

DENNIS ROBERTS
On Behalf of All Defendants

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By RECEIVED
MAR 04 1985
ROSE & STERN
Attorneys At Law

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT COURT

FILED
FEB 28 1985
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

APPELLANT,

NO. 83-3067

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, A/K/A KaMOOK BANKS,

APPELLEES.

ORDER

BEFORE: WALLACE AND CANBY, CIRCUIT JUDGES AND CRAIG*, DISTRICT JUDGE

The motion of the United States to recall and stay the mandate is DENIED.

*The Honorable Walter Early Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellant,	)	No. 83-3067
	)	
vs.	)	[No. CR 75-296-RE, USDC Or.
	)	
KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, KaMOOK BANKS,	)	DEFENDANTS-APPELLEES OPPOSITION TO GOVERNMENT'S MOTIONS TO STAY AND TO RECALL MANDATE
	)	
Defendants-Appellees.	)	

Defendant-Appellee DENNIS JAMES BANKS, by and through his counsel, Kenneth S. Stern of Rose & Stern, on behalf of himself and all other defendants-appellees most vigorously urges this Court to deny the Government's Motions to Stay and to Recall the Mandate issued in this case on January 16, 1985 and received by the District Court on January 18, 1985.

SUMMARY OF ARGUMENT

Since the mandate has issued, affirming Judge Redden's ORDER dismissing the indictment with prejudice, the Government's Motions to Stay Mandate and Recall Mandate are moot. Furthermore, under the circumstances of this case, this Court no longer has jurisdiction to grant the Government's requested relief.

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FACTUAL BACKGROUND

After this Court issued its opinion in late August of 1984, the Government filed its Petition for Reconsideration. That Petition was denied on January 8, 1985. Federal Rule of Appellate Procedure 41(b) requires a Motion for a Stay of Mandate Pending Application for Certiorari to be filed or the mandate shall issue within 7 days after the petition for rehearing is denied. FRAP 41(a). As no such motion was filed. The mandate issued on January 16, 1985 and was received by the District Court on January 18, 1985.[1] Defense counsel informed their clients that the receipt of the mandate put Judge Redden's ORDER dismissing the case into effect. They were informed that for the first time in ten years the Government was no longer actively trying to prosecute them. They were told that the case was dead.

Eight days after the burden of these charges was finally lifted from the defendants' lives, defense counsel received a MOTION to STAY MANDATE--and three days later a MOTION to RECALL MANDATE. Apparently the Government has not yet finally decided to let this case enjoy its quiet and well deserved death. However, the Government can point to no

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1 The ORDER denying reconsideration is appended hereto as Exhibit "A", the first page of the mandate as Exhibit "B,", the MOTION TO STAY MANDATE as Exhibit "C," and the MOTION TO RECALL MANDATE as Exhibit "D." It should also be noted that defense counsel have not received service of any petition for certiorari to this date, and have no knowledge of any such petition having been filed.

Rules of Appellate Procedure that provide this Court with the powers of resurrection.

ARGUMENT

MOOTNESS

The MOTION TO STAY MANDATE is clearly moot as it was filed after the mandate has been properly issued pursuant to FRAP 41.

LACK OF JURISDICTION

The "appellate process is terminated . . . when an appellate court issues its mandate of affirmance." United States v. Cook, 705 F.2d 351 (9th Cir., 1963).

Once a mandate issues jurisdiction is terminated. However, jursidiction may be reasserted by recalling the mandate in some circumstances. This case does not represent one of those few circumstances.

Only where the mandate was erroneously issued, or where it must be changed in order to effectuate the judgement may it be recalled. Litigation is "settled" once a mandate issues, and it should be recalled "sparingly" and then only under "exceptional circumstances" where "good cause" is shown Dilley v. Alexander, 627 F.2d 407, 410 (D.C. Cir., 1980). See: Wright, 16 Federal Practice and Procedure Sec 3938 (pps 276-290) and 5B C.J.S. Sec. 1995-1996 (pps. 648-652).

The Government does not allege any "good cause"[2] in its motion, and for good reason. This Court did not err in issuing its mandate, nor does the mandate need to be "corrected" in any fashion. Defendants know of no case that suggests that the Court has jurisdiction to recall the mandate in order to undo the effect of the Government's unexcused and unexplained failure to file a timely motion to stay mandate. Indeed, obvious policy considerations militate against granting the Government's requested relief, even if this Court did have jurisdiction.

Additionally, even if a Court can reassert jurisdiction by recalling a mandate in some circumstances, it is unclear whether it can do so once a criminal action has been dismissed. The issuance of a mandate puts "the appellate decision into effect." Wald v. Regan, 706 F.2d 794, 803 (1st Cir., 1983). The appellate court decision in the instant case was not one that merely returned jurisdiction to the District Court to proceed further. The mandate affirmed Judge Redden's ORDER dismissing this case with prejudice, and put said order into effect. In essence, it was the entrance of a "final judgement." See: United States v. Tulare Lake Canal Co., 677 F.2d 713, 715 (9th Cir., 1982). This case was DISMISSED WITH PREJUDICE since January 16, 1985. It remains dismissed. In this circumstance, this Court has no

[2] In fact, the Government suggests no reason at all why the mandate should be recalled.

jurisdiction to breathe life into it again---and any attempt to do so would profoundly impact defendant's constitutional rights, including, but not limited to, their rights to due process of the laws and to be free from cruel and unusual punishments.

CONCLUSION

Once the mandate of this Court issues affirming a lower court, the "appellate process is terminated." Catmitsch v. Ricsley, 705 F.2d 351 (9th Cir., 1983). On January 19, 1985[3] for the first time in ten years, the defendants were advised that the word "dismissed" actually meant that the Government was both disinclined to continue prosecuting them, and barred from changing its mind. They were told that the "appellate process is terminated," Judge Redden's ORDER dismissing the case with prejudice had actually gone into effect. They were told that the Government could no longer appeal that ORDER. They were told that the issuance of the mandate meant that the case was over, finally.

For whatever reason, the Government chose not to file a Motion to Stay Mandate. The mandate issued, and has taken effect.

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[3] The day counsel received a copy of the mandate.

"History repeats itself---first as tragedy, then as farce." In 1976 the Government delayed unnecessarily, but was allegedly not sufficiently "forewarned" of the consequences of that delay. Rule 41 is its own forewarning. No timely motion to stay, as required by the rule, was filed. The mandate issued. This case is dismissed with prejudice, pursuant to the judgement of the Ninth Circuit. It may be pursued by the Government no further.

For all the foregoing reasons, counsel plead with this Court to deny the Government's motions.

Finally, it should be noted that counsel would be hard pressed to explain to their clients how the ressurrection of this case once the final death certificate has been filed by this Court does not support their perception of the "forked tongue syndrome."

Respectfully submitted,

ROSE & STERN,

by Kenneth S. Stern
ROSE and STERN
Suite 101 Kellogg Building
1935 SE Washington St.
Milwaukie, Oregon 97222
(503) 654-7792

Of Attorneys for Defendants-Appellees

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT COURT

FILED

JAN 8 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATE OF AMERCIA,

APPELLANT,

NO. 83-3067

O R

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, A/K/A KaMOOK BANKS,

APPELLEES.

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By _____
JAN 10 1985
ROSE & STERN
Attorneys At Law

BEFORE: WALLACE AND CANBY, CIRCUIT JUDGES AND CRAIG*, DISTRICT JUDGE

A majority of the panel as constituted above has voted to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

*The Honorable Walter Early Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

EXHIBIT "A"

JUDGMENT

FILED

JAN 18 8 29 AM '85

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, aka KaMOOK BANKS,

Defendants-Appellees.

No. 83-3067

DC CV 75-296 JAR

RECEIVED
By _____
JAN 19 1985
ROSE & STERN
Attorneys At Law

APPEAL from the United States District Court for the PORTLAND District of OREGON

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the PORTLAND District of OREGON

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY JAN 16 1985
ATTEST
PHILLIP B. WINBERRY
Clerk of Court
by: _____
Deputy Clerk

Filed and entered August 30, 1984

EXHIBIT "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, also known as KaMook Banks, Defendants-Appellees.	NO. 83-3067 [No. CR 75-296-RE, USDC Oregon] MOTION TO STAY MANDATE

The United States of America by Charles H. Turner, United States Attorney for the District of Oregon, moves the Court for an order staying the issuance of the mandate in the above case pending resolution of the Government's petition for certiorari.

RECEIVED
By _____
JAN 29 1985
ROSE & STERN
Attorneys At Law

Dated this 24th day of January, 1985.

Respectfully submitted,

Charles H. Turner

CHARLES H. TURNER
United States Attorney
District of Oregon

312 United States Courthouse
620 S.W. Main Street
Portland, OR 97205

(503) 221-2766
FTS: 423-2766

EXHIBIT "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, and DARLENE PEARL NICHOLS, also known as KaMook Banks, Defendants-Appellees.	NO. 83-3067 [No. CR 75-296-RE, USDC Oregon] MOTION TO RECALL MANDATE

RECEIVED
By _____
JAN 30 1985
ROSE & STERN
Attorneys At Law

The United States of America by Charles H. Turner, United States Attorney for the District of Oregon, moves the Court for an order recalling the mandate in the above case pending resolution of the Government's petition for certiorari.

Dated this 29th day of January, 1985.

Respectfully submitted,

Charles H. Turner

CHARLES H. TURNER
United States Attorney
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EXHIBIT "D"

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS' OPPOSITION TO MOTIONS TO STAY AND RECALL MANDATE on Charles Turner, attorney of record for Plaintiff-Appellant by mailing to said attorney a correct copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney at said attorney's regular office address, to wit:

Charles Turner
312 United States Courthouse
620 SW Main Street
Portland, Oregon 97205

and deposited in the post office at Milwaukie, Oregon on this day. Between the said post office and the above address to which said copy was mailed, there is a regular communication by U.S. Mail.

DATED: January 31, 1985

Kenneth S. Stern
Of Attorneys for Defendants-Appellees

1-CERTIFICATE OF SERVICE

Office - Supreme Court, U.S.
FILED
APR 4 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1361

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Respondents devote the bulk of their lengthy opposition to arguments on the merits without providing any convincing reason why certiorari should not be granted in this case. The truth of the matter is that the proper treatment under the Sixth Amendment of time on appeal is an important, recurring question not foreclosed by the Speedy Trial Act, on which the courts of appeals are divided. Review by this Court is plainly warranted.

1. Respondents' argument (Br. in Opp. 18-20) that this case is moot because the court of appeals' mandate issued[1] is wholly lacking in substance. It is settled law that the

[1]The government filed a motion to stay the mandate pending resolution of its petition for certiorari, but the mandate had already issued (Br. in Opp. App. 17a, 18a). A motion to recall the mandate was denied (*id.* at 9a, 19a).

issuance of a court of appeals' mandate has no effect on the power of this Court to review its judgment. See, *e.g., Aetna Casualty Co.* v. *Flowers,* 330 U.S. 464, 467 (1947). In *Carr* v. *Zaja,* 283 U.S. 52, 53 (1931), the respondent advanced the same argument on which respondents here rely: "the mandate of the Circuit Court of Appeals was not stayed, but was issued to the District Court * * * [and] therefore the case is finished." This Court rejected that contention, holding (*ibid.*) that issuance of the mandate "does not defeat [its] jurisdiction."

The reason for this rule is plain. A reversal of the judgment of a lower court by this Court serves to vacate that judgment and to nullify all that was done under the mandate embodying the erroneous judgment.[2] See *United States* v. *Villamonte-Marquez,* 462 U.S. 579, 581-582 n.2 (1983); *United States* v. *Morrison,* 429 U.S. 1, 3 (1976) (per curiam); *Mancusi* v. *Stubbs,* 408 U.S. 204, 206-207 (1972); *Bakery Sales Drivers Local Union No. 33* v. *Wagshal,* 333 U.S. 437, 442 (1948); *Dakota County* v. *Glidden,* 113 U.S. 222, 224 (1885). Accordingly, should this Court ultimately reverse the judgment of the court of appeals, which had affirmed the district court's dismissal of the indictment, the indictment would automatically be reinstated, and the prosecution could continue. The parties therefore retain " 'a legally cognizable interest in the outcome' " of the case. *Murphy* v. *Hunt,* 455 U.S. 478, 481 (1982) (citations omitted).

Respondents evidently would carve an exception to this rule — judgments reversed can be reinstated, money paid can be recovered, but indictments, once dismissed, are forever incapable of being revived. Such an exception

[2]Moreover, if issuance of the mandate mooted a case, the courts of appeals could in many cases insulate their judgments from review by this Court merely by denying motions to stay or recall their mandates.

finds no basis in logic[3] and would further no policy,[4] but rather would serve only to create a wasteful stay practice in the courts of appeals and in this Court, devoid of practical utility. *Villamonte-Marquez* surely does not support respondents' position.[5] There, the government had obtained a voluntary dismissal of the indictment following issuance of the court of appeals' mandate. The Court's observation (462 U.S. at 581-582 n.2) that the indictment had merged with the convictions was directed to the contention that the government's *voluntary* dismissal, which according to the dissent was not required by the court of appeals' mandate (*id.* at 596 (Brennan, J., dissenting)), had mooted the case. Neither the Court (*id.* at 581 n.2) nor the dissenting Justices (*id.* at 595 (Brennan, J., dissenting)) disputed the fundamental principle that compliance with the mandate pending

[3]There is nothing peculiar to indictments that does not allow them to be revived following issuance of the court of appeals' mandate. Even if there were, this Court could order the court of appeals to recall its mandate, thereby meeting all of respondents' objections. Respondents' contention (Br. in Opp. 18) that, because the indictment was dismissed with prejudice, "no new indictment can be issued" wholly misses the point that reversal by this Court would not require a new indictment but would simply reinstate the old one. We further note that, if respondents were correct on this point, it would seem to follow that government appeals from district court orders dismissing indictments would equally be "moot" unless the judgment of dismissal were stayed pending appeal. This would totally undermine existing practice in such cases, since stays have never been thought necessary to preserve the government's appeal rights.

[4]Obviously no double jeopardy concerns are present in this case, where the indictment was dismissed prior to trial.

[5]Nor does *United States* v. *Cook,* 705 F.2d 350 (9th Cir. 1983) (erroneously cited as *Calmitsch* v. *Ricsley* (Br. in Opp. 20)), support their argument. That case merely holds that, for purposes of the timeliness of a new trial motion under Fed. R. Crim. P. 33, the date of the "final judgment" is that on which the court of appeals' mandate issued, not when certiorari was denied. Nothing in the case suggests that this Court is powerless to reverse a court of appeals' judgment simply because its mandate has issued.

review by this Court does not deprive the Court of jurisdiction. Here, of course, the government has not taken a single step following issuance of the mandate to indicate in any way that it is abandoning the prosecution. Indeed, the judgment and mandate of the court of appeals required no action that might be subject to a stay. Nothing at all has happened following issuance of the mandate: the district court had dismissed the indictment, and the court of appeals' affirmance and subsequent mandate have resulted in absolutely no change in the practical positions of the parties. The case is not moot.

2. Respondents next assert (Br. in Opp. 21-24) that the question of the proper treatment of appeal time under the Speedy Trial Clause is not worthy of this Court's consideration. Pointing to the small percentage of federal speedy trial claims that arise under the Sixth Amendment as compared to those under the Speedy Trial Act (18 U.S.C. 3161 *et seq.*), respondents contend that the issues presented are not of continuing importance in the wake of the Act. As we discussed in our petition (at 13 n.10), however, it is precisely because the questions presented are not governed by the Act that they have continuing significance under the Sixth Amendment. And as evidenced by the large number of cases cited in our petition (at 20-24), the issue is a frequently recurring one. That cases raising the issue are only a small percentage of some larger subset of criminal cases is immaterial.

Moreover, the court of appeals' decision in this case, if allowed to stand, can be expected to spawn a number of similar claims in the future, threatening to nullify the government's right to appeal when significant delay may thereby be engendered. It is of course not uncommon for considerable delay to pass in the course of many appeals. This is especially true where the issues are important or difficult, as they often are in cases where the Solicitor

General has authorized an appeal. See, *e.g., United States* v. *Accardo,* 749 F.2d 1477 (11th Cir. 1985), reh'g pending, No. 82-5380 (three years); *United States* v. *Morgan,* 743 F.2d 1158 (6th Cir. 1984), petition for cert. pending, No. 84-1357 (two years); *United States* v. *Thompson,* 710 F.2d 1500 (11th Cir. 1983), cert. denied, 464 U.S. 1050 (1984) (three years); *United States* v. *Computer Sciences Corp.,* 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983) (two years); *United States* v. *DiBernardo,* 552 F. Supp. 1315 (S.D. Fla. 1982), appeal pending, No. 83-5295 (11th Cir.) (two years). The rule adopted by the court of appeals here could effectively deny the government the opportunity to seek review in this Court of orders affirming the dismissal of indictments or the suppression of evidence because of the length of time necessarily associated with this Court's review.

3. Respondents' attempt (Br. in Opp. 41-42) to distinguish the conflicting decisions of the Fifth, Seventh, and District of Columbia Circuits (see Pet. 20-21) is wholly unpersuasive. In *United States* v. *Jackson,* 508 F.2d 1001 (7th Cir. 1975), the court flatly held (*id.* at 1004) that the time spent on government appeals "should not be considered" in determining the length of delay for purposes of *Barker* v. *Wingo,* 407 U.S. 514 (1972). Nothing in the *Jackson* opinion supports respondents' contention (Br. in Opp. 41) that the court's statement is limited to prospective delay.[6] In *United States* v. *Bishton,* 463 F.2d 887 (D.C. Cir. 1972), the court reasoned (463 F.2d at 890) that only an improper appeal (*e.g.,* one taken by the government in bad

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[6]Indeed, respondents' concession (Br. in Opp. 41) that taking future delay into account would be "improper" because it "would in fact deny the Government its right to appeal" applies equally to delay that has already occurred on appeal. Respondents suggest no basis for disregarding one but not the other.

faith) could give rise to constitutional speedy trial concerns. Respondents distinguish this holding (Br. in Opp. 42) by the non sequitur that the *Bishton* court's rule allowing time on *improper* appeals to count for Sixth Amendment purposes "compels the conclusion that *all* appellate delay must be counted" (emphasis added). The court in *Bishton* certainly did not accept such curious reasoning, and respondents offer nothing to support it. Respondents similarly offer nothing to distinguish *United States* v. *Herman*, 576 F.2d 1139 (5th Cir. 1978), which followed the reasoning of *Jackson* and *Bishton* in refusing to find a Sixth Amendment violation resulting from government appeal time.[7]

4. Finally, respondents urge (Br. in Opp. 56) that the record in this case is too "muddied" to make it suitable for this Court's review. This contention utterly lacks merit. This case starkly presents the questions of the proper treatment under the Speedy Trial Clause of time on both government and defense appeals. The number of decisions, the presence of an en banc decision and an unreported superseded panel decision (both on an issue unrelated to the petition), and the "political overtones" that respondents have attempted to inject into what should have been a straightforward prosecution for possession of firearms and explosives, are of course completely irrelevant to whether

[7]Respondents may be attempting (Br. in Opp. 42) to distinguish *Herman* on the ground that the court of appeals there appeared to count appeal time as part of the length of delay, and simply found the delay justified (see 576 F.2d at 1145-1146). As we indicated in our petition (at 13 n.11), this rule, if properly applied, may achieve the same result as not including the time within the length of delay in the first instance. In any event, the rule expressed in *Herman* clearly is at odds with that applied by the court of appeals in this case, which refused to excuse the time attributable to the government's appeals.

this Court should grant review.[8] There is nothing in the record of this case to interfere with the Court's direct consideration of the appropriate legal rules governing whether time on pretrial government and defense appeals may give rise to a violation of the Sixth Amendment.[9]

For the foregoing reasons and those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX. E. LEE
Solicitor General

APRIL 1985

[8]Respondents' assertion (*e.g.*, Br. in Opp. 56) of "Governmental misconduct" is without merit. Although the court of appeals concluded that the government could have gone forward with trial of the firearms counts in 1976, it nowhere questioned the government's good faith in refusing to do so (see Pet. 19 n.16). In any event, whether the government should in 1976 have gone forward on certain counts though not on others is irrelevant to the legal issues presented by our petition.

[9]The district court's alternative ground for decision under the Due Process Clause (see Br. in Opp. 56), which was not reached by the court of appeals, obviously will not prevent this Court from reviewing the court of appeals' ruling under the Speedy Trial Clause. As we noted in our petition (at 27-28 n.21), the district court's ruling in this regard is plainly wrong. We would have included the issue in the petition had the court of appeals reached it as an alternative ground for its affirmance of the district court.

DOJ-1985-04

Office-Supreme Court, U.S.
FILED
MAY 31 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1361

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 26, 1985
CERTIORARI GRANTED APRIL 15, 1985

BEST AVAILABLE COPY

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1906
Consolidated with 76-2127

EXPEDITED APPEAL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

KENNNETH MOSES LOUD HAWK, ET AL.,
DEFENDANTS-APPELLEES.

RELEVANT DOCKET ENTRIES

1976	
Apr 22	Docketed cause & entered appearances of counsel. jr
Apr 26	Filed aplt's motion for an order continuing the May 12, 1976 trial date, etc. pending appeal to (Schickele). jr
Apr 26	Filed Appellees' opposition to the appellant's request 4/23/76 for stay.
Apr 26	Filed order (Browning and Duniway) upon due consideration, the motion for an order continuing the trial date is denied. jr
Apr 28	Rec'd from appellant letter dated Apr 27, 1976, requesting that Exhibits D (attached to Motion for Order continuing the May 12, 1976 trial date) be replaced with the enclosed certified copy of Motion for Continuance, which is marked Exhibit D.
May 21	Filed cert transc record on appeal in thirteen volumes: vols., pldgs, three cert copies each; vols. V-XIII, rptrs transc, orig. & two copies each. cjb

June 3 Filed appellant's motion for an order consolidating appeals 76-1905 & 76-2127. to "C" cc

June 3 Filed order (C) for time schedule: 1) abstract of record etc., due no later than 6-2-76; 2) aplt's opening brief due no later than 6-30-76. 3) Aple's brief due no later than 7-21-76; 4) aplt's final brief due no later than 8-4-76; 5) this case is now calendared for hearing during the week of 9-7-76; fn

June 3 Filed cert suppl record on appeal: one volume of add'l pldgs, Vol. IV(A), three cert copies. One envelope in LPS. Record now in fourteen volumes. cjb

Jun 11 Filed order (C) consolidating 76-1906 and 76-2127 on appeal.

Jul 1 Filed 25 Aplt's Briefs (6/28/76) dmf

July 1 Filed aples motion (Hawk et al) for oral argument in Portland. to "C"

July 6 Filed order (C) In re: Argument in Portland, "Clerk will note Request." fn

Jul 19 Filed aple's motion (D. Banks) in opposition to oral argument being held in Portland, Oregon. to Schickele

Jul 21 Filed 4 Aplees' Briefs (7/21/76) dmf

Aug 3 Filed 25 Aplt's Reply Briefs (8/2/76 dmf

Aug 17 Rec'd aplt's letter of Aug 16, 1976, re case of *US v. Higginbotham.*

Oct. 15 Cause argued & submitted before: Ely, Hufstedler, & Trask, CJJ

Dec. 10 Filed Cert suppl record on appeal in four Vols: one vol of pldgs, Vol. IV(B), Cert. & two copies & three Vols. of R/T, vols IV-VI, Orig. & two copies. Record now in eighteen volumes. (to panel) vt

1977

July 26 Filed Opinion (Hufstedler) Trask dissenting, filed & judg to be filed & entd

July 26 Filed opinion—Affirmed

July 26 Filed & entd Judgment. fn

Aug 2 Aplt's (USA) emergency motion for an order extending the time in which to file a petition for rehearing with a suggestion for rehearing en banc. 8-1 (panel) bc

Aug 11 Filed, as of Aug. 2, order (H) Aplts emergency motion for an order extending the time to and including Sept. 8, 1977 in which to file a petition for rehearing with a suggestion for rehearing en banc is granted. fn

Aug 12 Rec'd, as of Aug 11, memorandum from Judge Trask, upon receipt of this notice you will not issue the Court's judgment until notice from the Chief Judge or the En Banc Coordinator. bc

Sept 7 Filed (orig. & 24) aplt's Petition for Rehearing w/suggestion for rehearing en banc. 9/6 active judges ec

Oct 25 Filed as of Oct. 17, ordr (BR, E, H, W, T, CY, G, WL, KY, A. & HUG, CJJ) Upon the request of a regular active judge of this court that the appeals 76-1906 & 76-2127 be taken en banc, vote was called, and upon vote of a majority of the regular active judges it is ordered that the assignment of the above entitled cases #'s 76-1906 & 2127 heretofore made Judges Ely, Hufstedler, and Trask is withdrawn. The case will be submitted to the court sitting en banc, to be argued at S.F. at 1:30 P.M.—fn *The Honorable Joseph T. Sneed recused himself from consideration of this matter.

Oct. 25 CASE RE-OPENED, as of Oct. 17, 1977.

Oct. 26 Filed Appellees' Emergency motion pursuant to Rule 6(g) for an order extending the time for oral argument from Nov. 9, 1977, to a date thirty (30) days thereafter. (active judges) ec (10-24-77)

Oct. 27 Filed Appellees' motion for reconsideration and vacation of order allowing petition for rehearing en banc. 10-26 (active judges) ec

Nov 2 Filed Notice of appearance of Karen Spelice as co-counsel for appellee Dennis James Banks. ec

Nov 3 Rec'd aplt's letter dated Oct 31, re addl authorities. (active judges) ec

Nov 4 Filed, as of Nov. 1, order (BR, E, H, W, T, CY, G, WL, KY, A, & HUG, CJJ) Aples' emergency motion for continuance is denied.

Nov. 8 Rec'd in 76-2127, from aple (Dennis Banks) letter dated 11/8, re: issue of destruction of evidence. (active judges)

Nov. 9 Argued and submitted to BR, E, H, W, T, CY, G, Wl, KY, AG, HG, en banc (Judge Sneed recused himself in this case)

1978

Feb 2 Rec'd from U.S. Atty. letter dtd. 1/31, re case of US v. Picaricel (active judges) ec

Mar 8 Filed, as of Mar. 6, order (BR, E, H, W, T, CY, G, WL, KY, A, & HG (ELY & CY DISSENTING)) This case is remanded to the D.C. with instructions to conduct evidentiary hearings and to make specific findings of fact with respect to the following matters: (SEE CASE FILE). This case [*sic*] retains jurisdiction of this case and requests the D.C. to hold hearings and make findings pursuant to this limited remand within 45 days of the date of this order, or as soon thereafter as practicable. fn

May 3 Filed, as of May 1, in 75-2293, order (BR, KL & T) The order of submission entered in this case #75-2293, on May 10, 1977 is vacated pending a final decision by the U.S. Court of Appeal (En Banc) of *U.S. v. Loud Hawk, et al.*, Nos. 76-1906 and 75-2124 at which time

the case will be automatically resubmitted. fn

Jun 23 Recvd from DC cert copy order extending time for the parties to file proposed findings of fact to July 14, 1978. (court) ec

Aug 29 Rec'd as of Aug. 28, from the D.C., Findings of fact and conclusions of Law which was filed in the D.C. Aug. 23, (Pursuant to Order of Mar. 6, 1978). (To all the judges listed on the above order of Mar. 6, 1978). fn

Sep 18 Filed cert supplemental record on appeal: one envelope of exhibits in LPS (R/T dated 5/9 & 5/10, 1978). To Trask (per Mancini) -dmf-

Oct 10 Sent Originals R/T's, Vols 5-16, to Judge Kennedy

Dec 4 Filed Aplt's (USA) add'l citations. (Active judges)

1979

May 4 Rec'd, as of 5/3/79, Aplt's (USA) add'l citations. (active judges)

Aug 13 Filed, as of 8/7/79, order (BR, E, H, W, T, CY, G, WL, KY, A & HG) The order of 10/17/77, is amended as follows: The opinion previously filed on July 26, 1977, is withdrawn.

Aug 13 As of 8/7/79, ordered opinion (Trask); Kennedy concurring; Goodwin specially concurring (Wright & Trask join); Hufstedler dissenting (Ely & Hug concur); Ely dissenting; filed & judgment to be filed & entered. nw

Aug 13 As of 8/7/79, Filed opinion—We REVERSE the orders of the district court granting aples' motions to suppress and to dismiss the indictment with prejudice. Further, we REMAND the cause to the district court with instructions: (1) to deny aples' motion to suppress, (2) to reinstate the indictment as to the dynamite counts, and (3) to reconsider its dismissal of the nondynamite counts with prejudice in light of this opinion.

Aug 13 As `8/7/79, Filed & entered judgment

Aug. 17'79 Filed Orig. & 24 Appellee's Petition For Rehearing En Banc for 76-1906 & 76-2127. (8/16/79. Panel & all active judges. ff

Aug. 20'79 Filed Letter of 8/17/79 from Appellee's advising Court at two word errors in Petition and Corrections to be noted. (8/17/78). Panel & all active judges.

Sep 19 Filed, as of 9/13/79, Order 9BR, E, H, W, T, CY, G, WL, KY, A & HG) It is ordered that Footnote 3 of the separate opinion of Judge Kennedy be deleted and the following language substituted in its place: 3. In United States v. Heiden, 508 F.2d 898 (9th Cir.1974), a panel of this circuit stated that where evidence has been lost or destroyed the conviction will be reversed if the defendant can show "(1) bad faith or connivance on the part of the Government, or (2) that he was prejudiced by the loss of the evidence." As the discussion in *Heiden* demonstrates, "prejudice" as used there means serious impairment of the accused's ability to presert his defense. In cases of severe prejudice the *Heiden* formulation would lead to the same result as under the test set forth in this case, and we think, therefore, that our holding here is not wholly inconsistent with *Heiden*. Whether or not the *Heiden* test can be reconciled with this case, however, it is the test set forth here and not the one in *Heiden* which should be deemed controlling in all future cases. -pb-

Oct 3 Filed, as of 10/1/79, order (BR, F, H, W, T, CY, G, WL, KY, A & HG) The petition for rehearing is REJECTED.

Oct 5 Filed Apl's motion to stay issuance of mandate pending application for writ of certiorari. (10/5/79) (Hufstedler) -pb-

Dec 3 Filed, as of 11/27/79, Order (BR, E, H, W, T, CY, G, WL, KY, A & HG) The following

changes should be made in the slip opinion: CASE FILE. -pb-

Nov. 30 Received SC notice for filing petition for cert on 11/28/79, SC #79-5687

Dec. 11 Sent to Solicitor General, Vol. I, CA Proceedings, Vols. II-VII, Pleadings, Certified mail #2288907 -cde-

1980

March 11 Filed certified copy of SC order of 3/3/80, denying cert. pn

Mar 11 Mandate issued.

RECORD RET'D DATE: APR 3, 1980
Pldgs: Vol(s)
R/T's: VOl(s) 5-13 orig. & 2 cy's
Exch's:___ Br.,1__Env, ( ) Sealed
Ctfd Mail No. 6561070

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-2127
Consolidated with 76-1906

EXPEDITED APPEAL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

KENNETH MOSES LOUD HAWK, ET AL.,
DEFENDANTS-APPELLEES.

RELEVANT DOCKET ENTRIES

1976	
May 20	Docketed cause & entd appearances of counsel -fn-
May 21	Filed in 76-1906, cert transc record on appeal in thirteen volumes: VOls. I-IV, pledgs, three cert copies each; Vols. V-XIII, rptrs transc, orig. & two copies each. -cjb-
June 3	Filed in 76-1906, appellant's motion for an order consolidating appeals 76-1906 & 76-2127. to "C" cc
June 3	Filed in 76-1906 order (C) for time schedule::1) abstract of record etc., due no later than 6-2-76; 2) aplt's opening brief due no later than 6-30-76; 3) aple's brief due no later than 7-21-76 4) aplt's final brief due no later than 8-4-76; 5) this case is now calendared for hearing during the week of 9-7-76; -fn-
June 3	Filed in 76-1906, cert suppl record on appeal: one volume of add'l pldgs, Vol. IV(A), three cert copies. One envelope in lps. Record now in fourteen volumes. -cjb-
Jun 11	Filed, in 76-1906, order (C) consolidating 76-1906 and 76-2127 on appeal. -dmf-

FOR FURTHER PROCEEDINGS, SEE 76 -906

Oct. 15	Cause argued & submitted before: Ely, Hufstedler, & Trask, CJJ -mc-
1977	
July 26	Ordered opinion (Hufstedler) Trask dissenting, filed & judg to be filed & entd
July 26	Filed opinion—AFFIRMED.
July 26	Filed & Entd Judgment. -fn-
Aug 2	Filed, in 76-1906, Aplt's (USA) emergency motion for an order extending the time in which to file a petition for rehearing with a suggestion for rehearing en banc. 8-1 (panel) -bc-
Aug 11	Filed, as of Aug. 2, in 76-1906, order (H) Aplts emergency motion for an order extending the time to and including Sept. 8, 1977 in which to file a petition for rehearing with a suggestion for rehearing en banc is granted. -fn-
Aug 12	Rec'd, as of Aug 11, memorandum from Judge Trask, upon receipt of this notice you will not issue the Court's judgment until notice from the Chief Judge or the En Banc Coordinator. -bc-
Sept 7	Filed in 76-1906, aplt's (orig. & 24) Petition for Rehearing w/Suggestion for rehearing en banc. active judges -ec-
Oct 25	Filed, as of Oct. 17, in 76-1906, order (BR, E, H, W, T, CY, G, WL, KY, HUG, CJJ) Upon the request of a regular active judge of this court that the appeals 76-1906 & 76-2127 be taken en banc, vote was called, and upon the vote of the majority of the regular active judges it is ordered that the assignment of the above entitled cases #'s 76-1906 & 2127 heretofore made Judges Ely, Hufstedler and Trask is withdrawn. The case will be submitted to the court sitting en banc, to be argued S.F. at 1:30 p.m. -fn-
Oct 25	Case Re-Opened, as of Oct. 17, 1977.

Oct 26 Filed in 76-1906, aples' emergency motion pursuant to Rule 6(g) for an order extending the time for oral argument from Nov. 9, 1977, to a date thirty (30) days thereafter. (active judges) ec

Oct 27 Filed in 76-1906, appelees' motion for reconsideration and vacation of order allowing petition for rehearing en banc. (active judges) ec

Nov 2 Filed in 76-1906, notice of appearance of appearance of Karen Spelice as Co-counsel for appellee Dennis James Banks. ec

Nov 3 Rec'd in 76-1906, from aplt (USA) letter dated 10/31, re addl authorities. (active judges) ec

Nov 4 Filed, as of Nov. 1, in 76-1906, order (BR, E, H, W, T, CY, G, WL, KY, A, & HUG, CJJ) Aples' emergency motion for continuance is denied, in case #'s 76-1906 & 2127. -fn-

Nov 8 Rec'd from aple (Dennis Banks) letter dated 11/8, re: issue whether gov't should be held liable for the destruction of evidence in this matter. (active judges) ec

Nov 9 Argued and submitted to BR, E, H, W, T, CY, G, WL, KY, A, HG. (Judge Sneed recused himself in this case)

1978

Feb 2 Rec'd, in 76-1906,letter dtd. 1/31, from U.S. Atty, re case US v. Picariello. (active judges) ec

Mar 8 Filed, as of Mar. 6, in 76-1906, order 9BR, E, H, W, T, CY, G, WL, KY, A, & HG); ELY & CHOY DISSENTING; This case is remanded to the D.C. with instructions to conduct evidentiary hearings and to make specific findings of fact with respect to the following matters: (SEE CASE FILE). This case [*sic*] retains jurisdiction of this case and requests the D.C. to hold hearings and make findings pursuant to this limited remand within 45 days of the date of this order, or as soon thereafter as practicable. -fn-

May 3 Filed, as of May 1, in 76-2293, order (BR, KL & T) The order of submission entered in this case #75-2293, on May 10, 1977 is vacated pending a final decision by the U.S. Court of Appeals (En Banc) of *U.S. v. Loud Hawk, et al.*, Nos. 76-1906 and 76-2127, at which time the case will be automatically resubmitted. -fn-

Jun 23 Recvd in 76-1906, from DC cert copy order extending time for the parties to file proposed findings of fact to July 14, 1978. (Court)

Dec 4 Filed in 76-1906 Aplt (USA) add'l citations. (Active Judges)

1979

May 4 Rec'd, as of 5/3/79, in 76-1906, Aplt's (USA) add'l citations. (active judges) -nw-

Aug 13 Filed, as of 8/7/79, in 76-1906, order (BR, E, H, W, T, CY, G, WL, KY, A & HG) The orrer of 10/17/77, is amended as follows: The opinion previously filed on July 26, 1977 is withdrawn. -nw-

Aug 13 As of 8/7/79, ordered opinion (Trask); Kennedy concurring; Goodwin specially concurring (Wright & Trask join); Hufstedler dissenting (Ely & Hug concur); Ely dissenting; filed & judgment to be filed & entered. -nw-

Aug 13 As of 8/7/79, filed opinion—We REVERSE the orders of the district court granting aples' motions to suppress and to dismiss the indictment with prejudice. Further, we REMAND the cause to the district court with instructions: (1) to deny aples' motion to suppress, (2) to reinstate the indictment as to the dynamic counts, and (3) to reconsider its dismissal of the nondynamic counts with prejudice in light of this opinion.

Aug 13 As of 8/7/79, filed & entered judgment. JS/34 -nw-

Aug 17 Filed in 76-1906 Orig. & 24 appellee's Petition For Rehearing en Banc. (8/15/79). Panel & all active judges.

Aug 20 Filed in 76-1906 Letter of 8/17/79 from appellee's advising Court of two word errors in Petition and Corrections to be noted (8/17/79). Panel & all active judges.

Sep 19 Filed, in 76-1906, as of 9/13/79, Order (BR, E, H, W, T, CY, G, WL, KY, A & HG) It is ordered that Footnote 3 of the separate opinion of Judge Kennedy be deleted and the following language substituted in its place: 3. In United States vs. Heiden, 508 F.2d 898 (9th Cir. 1974), a panel of this circuit stated that where evidence has been lost or destroyed the conviction will be reversed if the defendant can show "(1) bad faith or connivance on the part of the Government, or (2) that he was prejudiced by the loss of the evidence." As the discussion in *Heiden* demonstrates, "prejudice" as used there means serious impairment of the accused's ability to present his defense. In cases of severe prejudice the *Heiden* formulation would lead to the same result as under the test set forth in this case, and we think, therefore, that our holding here is not wholly inconsistent with *Heiden*. Whether or not the Heiden test can be reconciled with this case, however, it is the test set forth here and not the one in *Heiden* which should be deemed controlling in all future cases. -pb-

Oct 3 Filed, as of 10/1/79, in 76-1906, order (BR, E, H, W, T, CY, G, WL, KY, A & HG) The petition for rehearing is REJECTED. -nw-

Oct 5 Filed, in 76-1906, aple's motion to stay issuance of mandate pending application for writ of certiorari. (10/5/79) (Hufstedler) -pb-

Nov 30 Received SC notice of filing petition for cert on 11/28/79, SC#79-5697. -pn-

Dec 3 Filed, in 76-1906, as of 11/27/79, Order (BR, E, H, W, T, CY, G, WL, KY, A & HG) The following changes should be made in the slip opinion SEE CASE FILE., -pb-

1980

March 11 Filed certified copy of SC order of 3/3/80, denying cert. -pn-

Mar 11 MANDATE ISSUED

RECORD RET'D Date: Apr 8, 1980
Pldgs: Vol(s) ___
RJI's: Vol(s) 5-13 Orig & 2 cy's
Leh's: ___, Bx, 1__ Env, ( ) Sealed
Cert Mail No. 6561070

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-1574
Consolidated with
80-1582, 80-1583, 80-1630

EXPEDITED APPEAL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

DENNIS JAMES BANKS, DEFENDANT-APPELLANT.

RELEVANT DOCKET ENTRIES

1980	
Aug 20	Docketed Cause & Entered Appearances of Counsel. -pb-
Aug 22	Rec'd copy of Kenneth S. Stern, Esq. notice of appearance filed in D.C. 4/24/80; and copy of oral motion by counsel Bailey for the appointment of Kenneth Stern, as counsel for aplt filed in D.C. 5/12/80 (order to follow) -pb-
Aug 25	Recvd from DC copy of CJA filed 8/22/80 appointing Kenneth Stern as counsel. -ff-
Sept 2	Filed order (Clk for EAW) for Time Schedule: transcript ordered August 21, 1980; transcript due September 19, 1980; aplt's opening brief, excerpt of record & designation of clerk's record due October 10, 1980; aple's designation due October 24, 1980; aple's brief due October 31, 1980; aplt's reply brief due November 7, 1980. -nw-
Sept 15	Filed, as of 9/9/80, Order (CFP) Upon its own motion, the Court orders the above-captioned cases consolidated on appeal. The parties will observe the following time schedule: 1) The transcript is due Sept. 19, 1980; 2) Opening briefs, excerpts of record, and designation of the

clerk's record on behalf of aplts Kenneth Moses Loud Hawk, Russ James Redner, and Dennis James Banks are due October 3, 1980. 3) Designations of the record on behalf of the government in all cases are due October 10, 1980. 4) The government shall file a brief containing its response to the opening brief filed by aplts Loud Hawk, Redner and Banks no later that Oct. 17, 1980. This brief shall also contain the government's opening arguments as to defendant-appellee Kamook Banks. 5) The reply briefs, if any, on behalf of aplts Loud Hawk, Redner and Banks are due Oct. 24, 1980. 6) Aple Kamook Banks shall file her response brief no later than Oct. 28, 1980. This case will be calendared before a regular panel of this Court in Nov. 1980. The above schedule does not contemplate any extension of time and, absent extraordinary circumstances, no motions for extension of time will be considered. -pb-

Sept 25	Filed aplts' motion to transfer pleadings in United States v. Loud Hawk to this case as exhibits. (9/23/80) (panel) -pb- (for all aplts)
Sept 25	Filed aplts' motion for extension of time for filing brief. (9/23/80) (panel) -pb- (for all aplts)
Oct 1	Filed CERTIFICATE OF RECORD (9/26). -ss-
Oct 7	Filed, as of 10/2/80, order (Senior Deputy Clk for the Court) The above-captioned appeals calendared for Thursday, November 6, 1980 in Portland, Oregon, are removed from the calendar for that date. They will be recalendared, before any panel, at the earliest convenience of the Court. -nw-
Oct 7	Filed, as of 10/2/80, order (EAW) Aplts' motion of 9/25/80 for an ext of time to file the opening brief is granted. The parties will meet this schedule: 1) Opening briefs, excerpts of record & designation of the clerk's record on behalf of aplts Loud Hawk, Redner & D. Banks are due October 15, 1980; 2) Designations of the record

on behalf of the govt in all cases are due October 22, 1980; 3) The govt shall file a brief containing its response to the opening brief filed by aplts Loud Hawk, Redner & Banks no later than October 29, 1980. This brief shall also contain the govt's opening arguments as to aple Kamook Banks; 4) The reply briefs, if any, on behalf of aplts Loud Hawk, Redner & Dennis Banks are due November 5, 1980; 5) Aple Kamook Banks shall file her response brief no later than November 12, 1980. Absent extraordinary circumstances, no further exts of time will be granted, and aplts' failure to comply with the time schedule may result in a dismissal of the appeal, revocation of bail, and/or other sanctions. FRAP 31(c), 46(b), (c).

Oct 15 Filed, as of 10/9/80, order (EAW) Aplt's motion of 9/25/80 to augment the record with pleadings and briefs in the prior actions, nos. 76-1906 & 76-2127, is referred to the panel that hears this case on the merits. -nw-

Oct 16 Filed orig & 15 Aplt's consolidated brief & 5 excerpts (10/15). -pf-

Oct 24 Fld aples mtn for ext of time to file brief (CRIMATT) 10/23/80. -kf-

Nov 3 Filed, as of 10/30/80, order (WRIGHT) The govt's motion of 10/24/80 for an ext of time to file its brief is granted. The govt's brief is due November 3, 1980. Reply briefs on behalf of aplts Loud Hawk, Redner and Dennis Banks are due November 12, 1980. The response brief of aple Kamook Banks is due November 14, 1980. -nw-

Nov 3 Filed Aplts' Motion to Supplement Record on Appeal. (10/30) (CRIMATT) -nw-

Nov 3 Filed orig & 15 Aples ans & opening brief (11/3). -pf-

Nov 4 Filed as of 10/1 CERT RECORD ON APPEAL IN 22 VOLS, PLDGS, VOL I-VIII copy R/T VOL IX-XXII orig -pv-

Nov 13 Filed orig & 15 Aplt's reply brief (11/12). -pf- (PANEL)

Nov 18 Filed orig & 15 Aple (K. BANKS) resp brief (11/14). -pf- (PANEL)

Nov 20 Filed, as of 11/12/80, order (WRIGHT) The motion of 11/3/80 of aplts and aple Kamook Banks to augment the record with the "various letters" listed on the index of the record submitted by the district court clerk is granted. Aplts and aple Banks will file a supplemental designation of the record with the clerk of the district court. The supplemental material will be filed with this court no later than December 29, 1980. -nw-

Dec 12 Rec'd, as of 12/11/80, Aple's letter dated 12/8/80 re: additional citations. (12/8/80) (panel) -pb-

1981

Jan 7 Argued & submitted before: Kennedy, Ferguson, Reinhardt, CJJ. -lb-

Jan 28 Filed Aple's Additional Citation. (1/26/81) PANEL. -ff-

Feb 2 Filed as of 1/29/81, order (Kennedy, Ferguson & Reinhardt) Aplts' motion of 9/28/80 to transfer all pleadings in *U.S. v. Loud Hawk*, Nos. 76-1906 & 76-2127 to the record on this appeal is hereby granted. (to records) -nw-

Feb 4 Transferred record in five vols pldgs from appeal 76-1906/76-2127 pursuant to order of 1/29 -pv-

Jan 29 Rec'd voucher #433264 from counsel. -jr-

Feb. 4 Voucher returned to counsel for completion. -jr-

Feb. 9 Rec'd voucher from counsel with corrections. -jr-

Feb. 13 Voucher sent to panel judge for approval. -jr-

Feb. 25 Rec'd voucher from Kennedy approving amount claimed. -jr-

March 13 Voucher sent to Browning for approval of excess amount claimed. -jr-

March 16 Rec'd voucher from Browning approving amount claimed. -jr-

March 25	Voucher forwarded to Administrative Office with supporting papers. -jr-
June 19	Filed Aplt's Additional Citation. (6/16/81). PANEL. -ff-
1982	
Mar 18	Rec'd in 80-1574, Aple's Additional Citations. PANEL (Counsel notified to send proof of Service) -js-
Mar 22	Rec'd from Aple Proof of Service -js-
July 29	Ordered Opinion (Reinhardt) filed and judgment to be filed and entered. -js-
July 29	Filed opinion—Reversed in part as to Kamook Banks; appeals of Dennis Banks, Redner and Loud Hawk are dismissed for lack of jurisdiction. -js-
July 29	Filed and entered judgment. -js-
Aug. 12	Filed orig. & 33 aplts' Petition for Rehearing and Suggestion for Rehearing En Banc. (10p.) (8/11/82) Panel & all active judges. -ru-
Aug. 12	Filed in 80-1583 aplt's mtn. to substitute Counsel Of Record for Appeal for Appearance Only, etc. (8/11/82) Panel & all Active Judges. -ru-
Oct. 5	Filed Order (Kennedy, Ferguson & Reinhardt) The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.
Oct 12	Filed Aplts' Motion to Stay Issuance of Mandate Pending Application for Writ of Certiorari. (10/8/82) Reinhardt -js-
Oct 18	Recv'd counsel's letter dated 10/15/82 requesting 60 days in support of 10/12/82 mtn. to stay the mandate. (10/15/82) Reinhardt. -ru-
Dec 7	Filed Order (SEN DEP CLK) Upon due consideration of aplt's motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition

	for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before Feb. 1, 1983, IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted.
Dec 13	Recvd SC notice of filing petition for cert on 12/3/82, SC#82-5828. -pn-
1983	
Jan 27	Filed certified copy of SC order of 1/10/83 denying cert. -dm-
Jan 27	MANDATE ISSUED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-1582
Consolidated with
80-1574, 80-1583, 80-1630

EXPEDITED APPEAL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RUSS JAMES REDNER, DEFENDANT-APPELLANT.

RELEVANT DOCKET ENTRIES

1980

Aug 25 ASSIGNED DOCKET NUMBER FOR APLT UNDER CJA. -nw-

Aug 26 DOCKET CAUSE AND ENTERED APPEARANCES OF COUNSEL. -nw-

Sept 2 Filed order (Clk for EAW) for Time Schedule: transcript ordered August 25, 1980; transcript due September 19, 1980; aplt's opening brief, excerpt of record & designation of clerk's record due October 10, 1980; aple's designation due October 24, 1980; aple's brief due October 31, 1980; aplt's reply brief due November 7, 1980. -nw-

Sept 15 Filed, in 80-1574, as of 9/9/80, Order (CFP) Upon its own motion, the Court orders the above-captioned cases consolidated on appeal. The parties will observe the following time schedule: 1) The transcript is due Sept. 18, 1980. 2) Opening briefs, excerpts of record, and designation of the clerk's record on behalf of aplts Kenneth Moses Moses Loud Hawk, Russ Redner, and Dennis James Banks are due October 3, 1980. 3) Designations of the

record on behalf of the government in all cases are due Oct. 10, 1980. 4) The government shall file a brief containing its response to the opening brief filed by aplts Loud Hawk, Redner and Banks no later than Oct. 17, 1980. this brief shall also contain the government's opening arguments as to defendant-aple Kamook Banks. 5) The reply briefs, if any, on behalf of aplts Loud Hawk, Redner and Banks are due Oct. 24, 1980. 6) Aple Kamook Banks shall file her response brief no later than Oct. 28, 1980. The above schedule does not contemplate any extension of time and absent extraordinary circumstances, no motions for extension of time will be considered. -pb-

Sept 25 Filed, in 80-1574, aplts' motion to transfer pleadings in United States v. Loud Hawk to this case as exhibits. (9/23/80) (Paenl) -pb- (for all aplts)

Sept 25 Filed, in 80-1574, aplts' motion for extension of time for filing brief. (9/23/80) (panel) -pb- (for all aplts)

Oct 1 Filed on 80-1574, CERTIFICATE OF RECORD (9/25). -ss-

FOR ALL FURTHER PROCEEDINGS, SEE 80-1574

1981

Jan 7 Argued & submitted before: Kennedy, Ferguson, Reinhardt, CJJ. -lb-

Jan 28 Filed in 80-1574 Aple's Additional Citation. (1/26/81) PANEL. -ff-

Jan 29 Filed, in 80-1574, order (Kennedy, Ferguson & Reinhardt) Aplts' motion of 9/25/80 to transfer all pleadings in *U.S. v. Loud Hawk*, Nos. 76-1906 & 76-2127, to the record on this appeal is hereby GRANTED.

Feb 4 Transferred record in five vols pldgs from appeal 76-1906/76-2127 pursuant to order of 1/29/ -pv-

Jan 29 Rec'd voucher #433289 from counsel. -jr-

Feb 6	Voucher sent to panel judge for approval. -jr-
Feb 11	Rec'd voucher from Kennedy approving amount claimed ($360.00) -jr-
Feb 13	Voucher sent to Administrative office. -jr-
June 19	Filed in 80-1574 Aplt's additional citation. (6/16/81). PANEL. -ff-
1982	
Mar 18	Rec'd in 80-1574, Aple's Additional citations. PANEL (Counsel Notified to send proof of Service) -js-
Mar 22	Rec'd from Aple Proof of Service. -js-
July 29	Ordered opinion (Reinhardt) filed and judgment to be filed and entered. -js-
July 29	Filed opinion—Reversed in part as to Ka-Mook Banks; appeals of Dennis Banks, Redner, and Loud Hawk are dismissed for lack of jurisdiction. -js-
July 29	Filed and entered judgment. -js-
Aug. 12	Filed in 80-1574 orig. & 33 aplts' joint petition for rehearing and suggestion for rehearing en banc. (10p.) (8/11/82) panel & all active judges. -ru-
Oct 5	Filed in 80-1574 Order (Kennedy, Ferguson & Reinhardt) The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. -js-
Oct 12	Filed in 80-1574, Aplts' Motion to Stay Issuance of Mandate Pending Application for Writ of Certiorari. (10/8/82) REINHARDT -js-
Oct 18	Recv'd In 80-1574 Counsel's Letter Dated 10/15/82 Requesting 60 days in support of 10/12/82 Mtn. to Stay the Mandate. (10/15/82) REINHARDT. -ru-
Dec 7	Filed in 80-1574, Order (SEN DEP CLK) Upon due consideration of aplt's motion for stay of the mandate of this Court in the above cause

	pending the filing, consideration ad disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before Feb. 1, 1983, IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted. -js-
Dec 13	Recvd SC notice of filing petition for cert on 12/3/82, SC#82-5828. -pn-
1983	
	Filed certified copy of SC order of 1/10/83 denying cert. -dm-
Jan 27	Mandate Issued

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-1583
Consolidated with
80-1582, 80-1574, 80-1630

EXPEDITED APPEAL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

KENNETH MOSES LOUD HAWK, DEFENDANT-APPELLANT.

RELEVANT DOCKET ENTRIES

1980

Aug 25 ASSIGNED DOCKET NUMBER FOR APLT UNDER CJA. -nw-

Sept 2 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. -nw-

Sept 2 Filed order (Clk for EAW) for Time Schedule: transcript ordered August 25, 1980; transcript due September 19, 1980; aplt's opening brief, excerpt of record & designation of clerk's record due October 10, 1980; aple's designation due October 24, 1980; aple's brief due October 31, 1980; aplt's reply brief due November 7, 1980. -nw-

Sept 8 Rec'd, as of 9/4/80, letter dated 9/2/80 from Hon. James A. Redden (DC) recommending that this appeal be expedited. (CRIMATT) -nw-

Sept 15 Filed, in 80-1574, as of 9/9/80, Order (CFP) Upon its own motion, the Court orders the above-captioned cases consolidated on appeal. The parties will observe the following time schedule: 1) The transcript is due Sept. 19, 1980; 2) Opening briefs, excerpts of record and designation of the clerk's record on behalf

of aplts Kenneth Moses Loud Hawk, Russ James Redner, and Dennis James Banks are due Oct. 3, 1980; 3) Designations of the record on behalf of the government in all cases are due Oct. 10, 1980; 4) The government shall file a brief containing its response to the opening brief filed by aplts Loud Hawk, Redner and Banks no later than Oct. 17, 1980. This brief shall also contain the government's opening arguments as to defendant-aple Kamook Banks. 5) The reply briefs, if any, on behalf of aplts Loud Hawk, Redner and Banks are due Oct. 24. 1980. 6) Aplt Kamook Banks shall file her response brief no later than Oct. 28, 1980. This case will be calendared before a regular panel of this Court in Nov. 1980. The above schedule does not contemplate any extension of time and absent extraordinary circumstances, no motions for extension of time will be considered. -pb-

Sept 25 Filed, in 80-1574, aplts' motion to transfer pleadings in *United States* v. *Loud Hawk* to this case as exhibits. (9/23/80) (panel) -pb- (for all aplts)

Sept 25 Filed, in 80-1574, aplts' motion for extension of time for filing brief. (9/23/80) (panel) -pb- (for all aplts)

Oct 1 Filed in 80-1574, Certificate of Record (9/26). -ss-

FOR ALL FURTHER PROCEEDINGS, SEE 80-1574

1981

Jan 7 Argued and submitted before: Kennedy, Ferguson, Reinhardt, CJJ. -lb-

Jan 28 Filed in 80-1574 Aple's additional citation. (1/26/81) PANEL.

Jan 29 Filed, in 80-1574, order (Kennedy, Ferguson & Reinhardt) Aplt's motion of 9/25/80 to transfer all pleadings in *U.S.* v. *Loud Hawk*, Nos.

76-1906 & 76-2127, to the record on this appeal is hereby GRANTED.

Feb 4 Transferred record in five vols pldgs from appeal 76-1906/76-2127 pursuant to order of 1/29 -pv-

June 19 Filed in 80-1574 Aplt's Additional Citations. (6/16/81). PANEL. -ff-

1982

Mar 18 Rec'd in 80-1574, Aple's Additions Citations. PANEL (Counsel notified to send proof of Service). -js-

Mar 22 Rec'd from Aple Proof of Service. -js-

July 29 Ordered opinion (Reinhardt) filed and judgment to be filed and entered. -js-

July 29 Filed opinion—Reversed in part as to Ka-Mook Banks; appeal of Dennis Banks, Redner, and Loud Hawk are dismissed for lack of jurisdiction. -js-

July 29 Filed and entered judgment.

Aug 12 Filed in 80-1574 orig. & 33 aplts' petition for rehearing and suggestion for rehearing en banc. (10p) (8/11/82) panel & all active judges. -ru-

Oct 5 Filed in 80-1574, Order (Kennedy, Ferguson & Reinhardt) The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. -js-

Oct 5 Filed in 80-1574 as of 8/12/82 Aplt's Mtn. substitute counsel of record for appeal for appearance only, etc. (8/11/82) panel & all active judges. -ru-

Oct 12 Filed in 80-1574, Aplts' motion to stay issuance of mandate pending application for writ of certiorari. (10/8/82) Reinhardt -js-

Oct 12 Filed Order (deputy clerk) Aplt's mtn. for substitution of counsel is granted Kenneth S. Stern will be appointed by separate order. -ru-

Oct 12 Filed CJA 20 voucher #334043 appointing Kenneth S. Stern, Esq. -ru-

Oct 18 Recv'd in 80-1574 Counsel's letter dated 10/15/82 requesting 60 days in support of mtn. to stay mandate. (10/15/82) Reinhardt. -ru-

Dec 7 Filed in 80-1574, Order (SEN DEP CLK) Upon due consideration of aplt's motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before Feb. 1, 1983, IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted. -js-

Dec 13 Recvd SC notice of filing petition for cert on 12/3/82, sc#82-5828. -pn-

1983

Jan 27 Filed certified copy of SC order of 1/10/83 denying cert. -dm-

Jan 27 Mandate issued

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-1630
Consolidated with
80-1574, 80-1582, 80-1583

EXPEDITED APPEAL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

DARLENE PEARL NICHOLS,
TRUE NAME KAMOOK BANKS, DEFENDANT-APPELLEE.

RELEVANT DOCKET ENTRIES

1980

Sept 4	ASSIGNED NUMBER. -pb-
Sept 19	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. -pb-
Sept 19	Filed, as of 9/9/80, in 80-1574, Order (CFP) Upon its own motion, the Court orders the above-captioned cases consolidated on appeal. The parties will observe the following time schedule: 1) The transcript is due Sept. 19, 1980. 2) Opening briefs, excerpts of record, and designation of the clerk's record on behalf of aplts Kenneth Moses Loud Hawk, Russ James Redner, and Dennis James Banks are due Oct. 3, 1980. 3) Designations of the record on behalf of the government in all cases are due Oct. 10, 1980. 4) The government shall file a brief containing its response to the opening brief filed by aplts Loud Hawk, Redner, and Banks no later than Oct. 17, 1980. This brief shall also contain the government's opening arguments as to defendant-aple Kamook Banks. 5) The reply briefs, if any, on behalf of

	aplts Loud Hawk, Redner, and Banks are due Oct. 24, 1980. 6) Aple Kamook Banks shall file her response brief no later than Oct. 28, 1980. This case will be calendared before a regular panel of this Court in Nov., 1980. The above schedule does not contemplate any extension of time and, absent extraordinary circumstances, no motions for extension of time will be considered. -pb-
Oct 1	Filed in 80-1574, CERTIFICATE OF RECORD (9/26). -ss-
Oct 8	Sent CJA-20 voucher (#548680) to counsel for aple. -pb-

FOR FURTHER PROCEEDINGS SEE 80-1574

1981

Jan 7	Argued & submmitted before: Kennedy, Ferguson, Reinhardt, CJJ.
Jan 16	Rec'd voucher #548680 from counsel. -jr-
Jan 20	Returned voucher to counsel for corrections. -jr-
Jan 28	Filed in 80-1574, aple's additional citation. (1/26/81) PANEL -ff-
Jan 28	Rec'd voucher from counsel with corrections. -jr-
Jan 30	Voucher sent to panel judge for approval. -jr-
Feb. 10	Rec'd voucher from Kennedy approving amount claimed. -jr-
Feb. 13	Voucher sent to Browning for approval of excess amount claimed. -jr-
Feb 18	Rec'd voucher from Browning approving excess amount claimed. -jr-
Feb 27	Voucher sent to Administrative Office. -jr-
June 19	Filed in 80-1574, Aplt's Additional Citations. (6/16/81). PANEL. -ff-

1982

Mar 18	Rec'd 80-1574 aple's additional citations. PANEL (Counsel notified to send proof of service). -js-

Mar 22	Rec'd from aple Proof of Service. -js-
July 29	Ordered opinion (Reinhardt) filed and judgment to be filed and entered. -js-
July 29	Filed opinion—Reversed in part as to Ka-Mook Banks; appeals of Dennis Banks, Redner, and Loud Hawk are dismissed for lack of jurisdiction. -js-
July 29	Filed and entered judgment JS/34 -js-
Aug 12	Filed Orig & 33 Defendant/aple's petition for rehearing and suggestion for rehearing en banc. (8/11/82) (13 pgs) Panel & all Active Judges. -js-
Oct 5	Filed Order (Kennedy, Ferguson & Reinhardt) The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. -js-
Oct 12	Filed in 80-1574, Aplts' motion to stay issuance of mandate pending application for Writ of Certiorari. (10/8/82) REINHARDT -js-
Oct 18	Recv'd in 80-1574 Counsel's letter dated 10/15/82 requesting 60 days in support of 10/12/82 mtn. to day mandate. (10/15/82) REINHARDT. -ru-
Dec 7	Filed in 80-1574, Order (SEN DEP CLK) Upon due consideration of aplt's m otion for stay of the mandate of this Court in the above cause pending the filing consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the clerk's office of the Supreme Court of the United States on or before Feb. 1, 1983, IT IS ORDERED that the motion for stay of mandate be and the same is hereby granted. -js-
Dec 13	Recvd SC notice of filing petition for cert on 12/3/82, SC#82-5827. -pn-

1983	
Jan 27	Filed certified copy of SC order of 1/10/83 denying cert. -dm-
Jan 27	Mandate issued.
Apr 1	Rec'd supp'l voucher from counsel via FPD for approval of claim on ptn/rehearing & cert. -rk-
Apr 11	Voucher forwarded to panel judge. -rk-
May 11	Voucher rec'd from panel judge. -rk-
May 13	Voucher forwarded to chief judge for approval of excess amount claimed. -rk-
May 19	Voucher rec'd from chief judge. -rk-
May 20	Voucher forwarded to AO w/supporting papers. -rk-

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3067

EXPEDITED APPEAL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, AND DARLENE PEARL NICHOLS, a/k/a KAMOOK BANKS, DEFENDANTS-APPELLEES,

RELEVANT DOCKET ENTRIES

1983	
Jun 21	ASSIGNED DOCKET NUMBER.
Jun 21	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. -ru-
Jun 21	Filed in D.C. 6/17/83, Time Schedule: Transcript to be ordered by Jul. 1, 1983; Transcript due Jul. 22, 1983; Aplt's opening brief, excerpts of record & designation of clerk's record due Aug. 12, 1983; Aple's designation due Aug. 25, 1983; Aple's brief due Sept. 2, 1983; Aplt's reply brief due Sept. 16, 1983. -ru-
July 5	Filed aple's motion for recusal of Ninth Circuit and issuance of certificate of necessity, (6/30/83), (CRIMATT). -jw-
July 15	Rec'd as of July 11, ltr dtd July 7, from V. Annette Murphy, of counsel for aple Banks, re: informing court that counsel for Banks is out of town on East Coast until 8/1/83, and letting court know that counsel plans to file opposition to government's designation of certain transcripts upon his return. (CRIMATT) -db-

July 15	Rec'd as of July 13, ltr dtd July 11, from Michael E. Rose, Esq., counsel for aple, re: designation of certain transcripts. (CRIMATT) -db-
July 15	Filed aplt's mtn to supplement aplt's transcript designation or in the alternative to remand the mtn for resolution by the trial court. (CRIMATT) 7/13 -db-
July 21	Filed Aplt/USA Mtn. for an order continuing the Government's witness subpoenas in this case, or in the alternative a remand of this Mtn. for resolution by the trial court. (7/18/83) CRIMATT. -ru-
July 22	Filed aple's (LOUD HAWK) opposition to aplt's mtn to supplement the govt's transcript designation or in the alternative to remand the mtn for resolution by the trial court. (CRIMATT) 7/20 -db-
July 26	Filed Order (CHOY & ALARCON) Aples' motion for recusal of the Ninth Circuit and for issuance of a certificate of necessity is denied. The appeal does not reasonably call into question this court's impartiality. -dm-
Aug 1	Filed aple's (LOUD HAWK) opposition to aplt's mtn for an order continuing the govt's witness subpoenas int his case, or in the alternative a remand of this mtn for resolution by trial court. (CRIMATT) 7/28 -db-
Aug 11	Filed aplt's motion for extension of time to file opening brief, (8/9/83), (CRIMATT).
Aug 11	Filed aple's opposition to the governments motion for an order continuing witness subpoenas; opposition to the governments motion to supplement the government's transcript designation, (8/9/83), (CRIMATT). -jw-
Aug 11	Filed aple's motion to strike parts of government's transcript designation (8/9/83), (CRIMATT). -jw-
Aug 11	Filed aple's motion to stay further proceedings in this appeal pending resolution of writ of

	mandamus filed in U.S. Supreme Court, (8/9/83), (CRIMATT). -jw-
Aug 17	Rec'd orig & 15 copies of aplt's opening brief and 5 excerpts of record, (50 pgs), (8/16), motion pending. -dm-
Aug 19	Filed Order (BOOCHEVER & REINHARDT) Aplt's motion to supplement its transcript designation is remanded to the district court for its consideration. Fed. R. App. P. 10(e); *Munich* v. *United Siates*, 330 F.2d 775, 776 (9th Cir. 1964). We intimate no view as to the merits. Aplt's motion to continue its witness subpoenas pending appeal is denied. -dm-
Aug 19	Filed Aple's mtn. to dismiss (8/18/83) CRIMATT. -ru-
Aug 19	Rec'd ltr dtd Aug. 17, from counsel for aples, re: requesting mtn to stay filed on 8/11/83 as an emergency mtn. (CRIMATT) -db-
Aug 26	Filed aple's mtn for ext of time to file brief. (CRIMATT) 8/24 -db-
Sept 2	Rec'd orig & 15 copies aple's brief (48 pgs) & supplemental excerpt of record. (Aplt's Opening Brief not filed yet, mtns pending) 9/1 -db-
Sept 2	Rec'd ltr dtd 9/1/83 from counsel for aple Banks, re: brief is being filed "under protect". (CRIMATT, with copy of brief.) -db-
Sept 7	Filed Order (KENNEDY & POOLE) Aples' motion to dismiss is frivolous and is denied. Aplt's motion of August 11, 1983 for an extension of time in which to file the opening brief is granted. The brief already rec'd shall be filed. Aples' motion to stay further proceedings in this appeal pending resolution of the writ of mandamus filed in the United States Supreme Court is denied. The parties will meet the following time schedule: aples' designation of the record is due Sept. 6, 1983; aples' brief is due Sept. 13, 1983; the reply brief, if any, is due Sept. 27, 1983. -dm-

Sept 7	Filed orig. & 15 aplt/USA Opening Brief & five excerpts of record. (50p.) (8/16/83). -ru-
Sept 7	Filed orig. & 15 aples' brief & five supplemental excerpts of record. (49p) (9/1/83). -ru-
Sept 26	Filed cert record on appeal in 41 volumes. Pleadings Vols. 1-10, cert copy, and R/T's Vols. 11-41, orig. only. -jw-
Sept 29	Filed orig and 15 copies of aplt's reply brief, (9 pages), (9/27/83). -jw-
Sept 30	Filed cert supplemental record on appeal in 1 volume. Pleadings Vol. 10a. Record now in 42 volumes. -jw-
Sept 30	Rec'd complimentary copy of aple's response to "Memorandum for the U.S. in Opposition," (9/28), filed in Supreme Court. -dm-
Oct 14	Filed cert of record (9/21/83) -db-
1984	
Jan 4	Argued & submitted to: Wallace, Canby, CJJ, Craig, DJ. -ss-
Jan 16	Rec'd voucher #783867 from counsel for approval of claim. -jr-
Jan 27	Voucher forwarded to panel judge for approval. -jr-
Feb 6	Rec'd voucher from panel judge. -jr-
Feb 9	Voucher forwarded to chief judge for approval of excess amount claimed.
Feb 14	Rec'd voucher from chief judge. -jr-
March 1	Voucher forwarded to Administrative Office with supporting papers. -jr-
May 3	Rec'd from counsel of Aple. letter dated 4/30/84. RE: Additional citation. (PANEL) -ru-
Aug 30	Ordered opinion filed (Canby), (Wallace dissenting) and judg to be entd. -dm-
Aug 30	Filed opinion—affirmed -dm-
Aug 30	Filed and entered judgment. -dm-
Aug 30	Rec'd, as of 2/6, voucher #433259 from counsel for approval of claim. -jr-
Aug 30	As of 3/14, voucher forwarded to panel judge for approval. -jr-

Aug 30	Rec'd, as of 5/22, phone call from FPD re: status of voucher. Voucher still pending.
Aug 30	As of 6/6, rec'd call from FPD re: status of voucher: Call referred to (Chief Deputy Clerk, CC). -jr-
Aug 30	Rec'd, as of 7/9, letter from counsel re: status of voucher. -jr-
Aug 30	As of 7/11, letter referred to panel judge. -jr-
Aug 31	Rec'd voucher from panel judge. -jr-
Aug 31	Voucher forwarded to chief judge for approval of excess amount claimed. -jr-
Sept 10	Rec'd voucher from chief judge. -jr-
Sept 17	Voucher forwarded to Administrative Office with supporting documents. -jr-
Sept 18	Filed as of 9/13 orig. & 33 aplt's petition for rehearing with suggestion rehearing en banc. (14p.) (9/12) (Panel & all Active Judges.) -ru-
1985	
Jan 8	Filed order (Wallace, Canby, Craig) A majority of the panel as constituted above has voted to deny the petition for rehearing and suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected. -sm-
Jan 16	Mandate issued.
Jan 28	Rec'd aplt's mtn to stay mandate (contacted counsel, re: need mtn to recall mandate) 1/24 -db-
Jan 29	Filed order (Wallace, Canby & Craig) The following modification is made to the opinion. In the left column at slip op. 3835, lines 6-8, there is a citation to *United States* v. *Marion*. The citation is amended to read: *United States* v. MacDonald, 456 U.S. 1,6 (1982) (citing *United States* v. *Marion*, 404 U.S. 307, 313 (1971). -db-

Jan 31	Filed aplts' mtn to recall mandate (Canby) 1/29 -db-
Feb 4	Filed aples opposition to aplt's mtn to recall & stay mandate (Canby) 1/31 -db-
Feb 8	Rec'd notice of change of address of counsel for aplee (Redner). -dmf-
Feb 28	Filed order (Wallace & Canby, CJ, Craig, DJ) The motion of the United States to recall and stay the mandate is DENIED.
Mar 13	Rec'd as of 3/8, notice from U.S. Supreme Court, re: filing of petition for writ of cert., filed in SC February 26, 1985, SC #84-1361. -jw-
Apr 19	Rec'd certified copy of SC order granting petition for writ of cert, order file dated 04/15/85. -emk-

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 75-296-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MOSES LOUD HAWK, DEFENDANT

RELEVANT DOCKET ENTRIES

11-17-75 Filed complaint and issued warrant.

11-18-75 First appearance:
Deft. admitted identity and was advised of rights.
Order setting for preliminary hearing Nov. 26, 1975, 9:30 a.m.

11-19-75 Filed Warrant with return showing arrest of deft. by FBI on 11-14-75.

11-25-75 Indictment returned—CR 75-296.

11-26-75 CLOSED—to Clerk.

1975

Nov. 25 1) Filed Indictment

Nov 25 2) Issued warrant for arrest of deft ($100,000 cash or corp. surety requested)

Nov [20] 3) Filed Deft's Motion for Pretrial Release

Nov 26 4) Record of arraignment: Ms. Lea and Mr. Schiffman will serve as counsel without fee. Defts waived reading of indictment. (Court summarized charges.) Defts were advised of rights. Order setting for plea 12/8/75 and bail motion

Nov 26 5) Filed return of service of bench warrant exec 11/26/75

Dec 8 6) Record of Entry of NOT GUILTY plea of Loud Hawk Russ Redner. Please of NOT GUILTY entered to each of cts 1 thru 9 by

each deft. Order setting for trial week of 2/9/76. 2 weeks jury. Order that pretrial motions be filed prior to Christmas Order allowing motion to appt. of investigators defense counsel to prepare form. Record of hearing on bail motion. Defts. witness Gregory Lynch Order reinstating bail to $50,000.00 Previously $100,000.00

Dec 8 7) Filed motion for contact visits

Dec 9 8) Filed findings and order that the motion for release is DENIED and bail is reduced to $50,000.00 m 12/17/75., J s 12/9/75

Dec 9 9) Filed order that defts. motion for an order requiring the U.S. Marshal has agents and employees to permit contact visits with their friends and relatives if DENIED m 12/17/75., ntfd J s.2/9/75

Dec 15 10) Filed defts. motion to review and amend the conditions of release for formal evidentiary bail hearing.

Dec 22 Filed Superseding Indictment

Dec 22 11) Issued warrant for arrest of deft. ($50,000.00 cash of corp. surety)

Dec 22 12) Record of order setting arr. and plea for 12/29/75 RCB

Dec 23 13) Filed govt. motion to compel handwriting exemplars

Dec 24 14) Filed defts. motion to suppress

Dec 24 15) Filed defts. first motion for discovery and inspection

Dec 24 16) Filed defts. motion for a bill of particulars

Dec 24 17) Filed defts. motion to dismiss or to suppress

Dec 24 18) Filed defts motion to disclose informants

Dec 24 19) Filed defts motion for inspection reproduction and copying or records and papers used in connection with jury selection process

Dec 24 20) Filed defts. motion to review and amend order regarding "Contact visits and motion for

contact meetings with potential defense witnesses

Dec 24 — 21) Filed defts. motion for search and disclosure of electronics or other surveillance

Dec 29 — 22) Record of arr. and pleas of NOT GUILTY entered as to cts. 1-4 of the indictment by defts. LOUD HAWK AND REDNER Ordered trial set for wk of Feb. 9, 1976. Ordered defts. file any additional motion not later than Jan 12, 1976. Gov. allowed 2 wks to answer and defts may reply within 1 week. Hearing date for motions set 1/23/76 at 9:30 AM. Record of Hearing defts motion for reduction of bail; Evidence adduced. Bail plan to be submitted to the court. Motion taken under advisement. RCB

Dec 29 — 23) Filed return of warrant for arrest of defts. LOUD HAWK dated 12/22/75 exec. 12/29/75

Dec 31 — 24) Filed order requiring the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof in the amount of $50,000.00, see order for more details m 12/31/75 ntfd RCB s 12/31/75

1976

Jan 8 — 25) Record of hearing on govt. motion for handwriting exemplars. Order granting with protective order that exemplars only by used in this case in Oregon. To be taken 1/9/76 in Marshals office. Record of hearing on motion for contact visits today. Order allowing. J

Jan 8 — 26) Filed order that defts. Loud Hawk and Redner are to furnish to a rep. of the FBI handprinting and handwriting samples which are to be used solely as a standard of comparison in order to determine whether or not they or both of them are the author of certain writings etc. m 1/9/76 J s 1/8/76

Jan 12 — 27) Filed defts. motion to compel the transcription of all future grand jury proceedings concerning these defts.

Jan 12 — 28) Filed defts motion for disclosure and inspection of grand jury minutes and testimony.

Jan 12 — 29) Filed defts. motion for disclosure of names of prospective jurors

Jan 12 — 30) Filed defts. motion for first amended motion for bill of particulars

Jan 12 — 31) Filed defts. motion to strike

Jan 12 — 32) Filed defts. motion to sever

Jan 12 — 33) Filed gov. response to defts LOUD HAWK AND REDNER motions; for inspection, reproduction and copying of records and papers used in connection with jury selection process. For search and disclosure of electronics and other surveillance; to disclose informants to dismiss or suppress; for discovery and inspection; to suppress; for a bill of particulars

Jan 14 — Filed gov. motion to move the court for an order to show cause directing Kenneth Loud Hawk and Russ Redner to show cause why they should not be held incriminal contempt for refusal to furnish handwriting exemplars as directed by the court.

Jan 16 — Filed return of summons and instructions exec. 1/15/76

Jan 20 — 34) Filed defts. reply to motion to disclose informants

Jan 20 — 35) Filed reply to gov, response to motion to suppress or dismiss

Jan 21 — 36) Record of pre hearing conference. Court may examine the Oregon State Police reports in camera if the goc. does not disclose these materials. Trial to be reset to March 8, 1976 on motion of the defts. Gov. requests for contempt hearing will be heard after the trial if this remains to be an issue. Counsel stipulate that all motions will be filed not later than Jan

28, 1976. exempt jurisdictional motions which may be filed later BE

Jan 23 37) Record of hearing defts. motions to dismiss cts 1, 2 and 3 of the ind. in the alternative to suppress. Motion to disclose informants and motion for search and disclosure of electronic or other surveillance and motion for disclosure and inspection of grand jury minutes and testimony and motion to strike language in cts. 1, 2 and 3. of the ind. Ordered motions taken U/A/Record of hearing defts. motions first motion for disclosure and inspection and motion for inspection reproduction and copying of records and papers used in connection with the jury selection process. Counsel inform court these matters have been or will be satisfied. Record of hearing defts. motion to sever the trial from trial of Banks and Peitier, Ordered motion *granted*. Record of hearing defts. motion to require gov. to disclose names of witnesses before grant jury *granted*. Record of hearing defts. motion to compel transcription of all future grand jury proceedings concerned these defts. *granted*. Record of hearings defts. motion for continuance of trial. Ordered motion *GRANTED*. and case continued from 2/9/76 to the firm date of 3/8/76 Ordered all motions to be filed not later than 1/28/76 except jurisdictional motions. Record of hearing defts. motion for disclosure of names and addresses of prospective jury panel *Under advisement*, but if this motion granted the names and addresses will not be disclosed prior to one wk before trial. Gov. motion for OSC re contempt will be heard after the trial. Counsel inform court that deft.s motion for bill to particulars in MOOT. Counsel inform court that 1st amended motion for bill of particular need not be heard at this time BE

Jan 23 38) Filed order that defts. motion to disclose informants be *DENIED*. because the defts. have not shown that the disclosure of the identity of the inf. would serve a necessary purpose. It is ordered that defts. motion for inspection reproduction and copying of records and papers used in connection with the jury selection process be *GRANTED*. It is ordered that defts. motion to dismiss or to suppress be *DENIED* It is ordered that the defts. motion to sever be *GRANTED*. It is ordered that if there is any further grand jury proceeding pertaining to this case the testimony should be reported, transcribed and given to defense counsel. It is ordered that the defts motion to strike is *DENIED*. 1/22/76 NTTFD be 1/22/76

Jan 23 39) Filed motion for continuance

Jan 28 40) Filed motion for rehearing or reconsideration

Jan 28 41) Filed defts. motion for enlargement of time to file pretrial motions

Feb 2 42) Record of order setting hearing for 9:30 2/6/76 on defts motion for pretrial release and motions to vacate the order severing trial of these defts from of deft Dennis Banks. Record of order granting defts motion to extend time file additional motions to 2/11/76. Record of order that all defts within the district be present in court when any other deft. in this case is present

Feb 5 43) Record of order granting Mr. Jones Motion to admit Mass. Attorney Lewis for the purpose of this action on behalf of deft. Loud Hawk. Record of hearing KaMook Banks motion for pretrial release. Ordered deft. be released on the of release plan approved by this court and deft. agree that the probation of may make any additional rules for implementation of this plan so long as the are not incon-

sistent with the plan. Record of hearing deft. Loud Hawk and Record of motion to reconsider the courts rul[illegible]gs under advisement to part. Court to set hearing prior to trial re destruction of evidence. Defts directed to submit pla___ regarding informants in defense camp. Record of order that deft. KaMook has until 2/20/76 to file pretrial motions. Record of order that defts Loud Hawk and Redner submit another prerelease plan BE

Feb 9 44) Filed order that (1) Counsel be provided at gov. expense copies of documents and materials from the official court records in Armsbury case (2) Counsel be provided copies of all samples reports and other documents which the clerk has submitted to the administrative office of the US courts regarding district of Oregon jury selection plan since 1969. (3) Counsel will be permitted to inspect questionaires forms etc. (4) Counsel will be permitted to inspect and collect data from the slips drawn in open court since 1969 which have contained the names of jurors summoned from grand or petit jury. (5) Counsel be permitted to match the names of jurors to which reference is made in par. 3 for purposes of collecting data. (6) Use of inf. is limited neither counsel for deft. or for the gov. may use the inf. obtained in this order to harass, embarrass, or invasion of privacy of any person. The info should not be used by either party to acquire any further ind. concerning the lives etc. of the person. No public disclosure of the jurors names will be made. BE

Feb 9 45) Filed order that Kenneth Loud Hawk and Russ Redner and each of them are released to the custody of Alan G. Deal, Minister First Unitaian Church Portland, Oregon and such other individuals as he may direct according to said Release agreement. It is further ordered that defts. shall report daily at or before the hour of 1:00 PM to said custodial person and that any failure to so report shall be reported to this court. It is further ordered that defts. shall adhere to the following cond. (1) shall personally appear at all hearings before this court. (2) shall reside at 3534 S.W. Hood St. Portland, Oregon and shall not leave the met. area (3) Defts. shall obey all laws m 2/9/76 BE s 2/9/76 notified

Feb 9 46) Filed defts motion and mem, re; third party release

Feb 9 47) Filed order to show cause that deft. appear 2/10/76 at 2:30 PM m 2/9/76, BE s 2/9/76

Feb 10 48) Filed order that the order to show cause filed 2/9/76 is taken off the courts calendar until further order of the court m 2/9/76, BE s 2/10/76

Feb 11 49) Filed return order to show cause exec. 2/9/76

Feb 12 50) Filed order specifying methods and conditions of release on deft. Russ Redner

Feb 11 51) Filed order specifying methods and conditions of release on deft. Kenneth Moses Loud Hawk

Feb 11 52) Filed deft. motion for additional peremptories

Feb 12 53) Filed order to show cause dated 2/18/76, before Judge Belloni at 9:30 AM m 2/12/76 BE s 2/12/76

Feb 12 54) Filed deft. motion for change in voir dire procedure

Feb 12 55) Filed motion for native American Judge

Feb 13 56) Filed order that the Clerk of this court file a copy of the Affid. of furnished to officials of the Canadian Gov. at their request for use in extradiction proceedings from Canada for deft. Peltier SK m 2/12/76 s 2/13/76

Feb 13 57) Filed affidavit of Eldon Olson

Feb 13 58) Filed affidavit of William P. Zeller

Feb 17 59) Record of order striking hearing on order to show cause set for 2/18/76 BE

Feb 19 60) Filed deft. motion to produce defense camp informants

Feb 20 61) Filed deft. motion to produce informants and for a pretrial hearing.

Feb 18 62) Record of conderence; Ordered deft. oral motion for cont. of trial grar and case continued from March 8th to May 12, 1976 Deft. directed to submit formal motion for continuance. At the request of the parties, ordered hearing evidentiary motions set for March 22, 1976 at 9:30 AM

Feb 20 63) Filed gov. designation of high risk

Feb 23 64) Filed deft. motion for continuance

Feb 23 65) Filed deft. REDNDER motion for permission to travel to Wash.

Feb 25 66) Filed deft. LOUD HAWK motion for permission to travel outside the district Oregon

Feb 25 67) Record of hearing deft. KaMook Banks mt. for modification of pretrial release plan for travel to Calif. from 2/25/76 to 3/2/76. Ordered motion granted

Feb 26 68) Filed motion to amend pretrial release plan m 2/25/76 BE s 2/25/76

Feb 26 69) Record of hearing deft. Loud Hawk and Redner motion to modify conditions of release to allow them to travel to the state of Wash. on 3/1/76. Ordered granted. BE

Feb 26 70) Filed order allowing travel for deft. Redner m 2/25/76 BE s 2/26/76

Feb 26 71) Filed order allowing travel for deft. Loud Hawk 2/25/76 BE s 2/26/76

March 2 72) Filed motion for permission to travel for Redner and Loud Hawk

March 3 73) Record of hearing on motion of Loud Hawk for permission to travel. Order to be submitted. J

March 3 74) Filed travel order for Kenneth Loud Hawk. m 3/5/76 J s 3/3/76

March 11 75) Filed Gov. response to defts. motion for additional preemptory challenge

March 11 76) Filed Gov. respons to defts. motion for change in voir dire

March 15 77) Filed Gov. answer to defts. motion for search and disclosure of electro or other surveillance

March 17 78) Filed Govt's Response to defts Redner, Loud Hawk and KaMook Banks' Motion to Produce informants and for a pretrial hearing

March 17 79) Record of prehearing conference. Ordered portion of defts. motion to suppress evidence set for hearing at 9 AM March 19, 1976 BE

March 18 80) Filed gov. mem, destruction of dynamite

March 19 81) Record of hearing defts. motion to suppress dynamite, Evidence adduced. ___ ed hearing continued to March 22, 1976 at 9:30 AM BE

March 22 82) Filed testimony of James M. Key

March 17 83) Filed motion for trial in Pendleton, Oregon

March 22 84) Filed list of exhibits and witnesses

March 22 85) Record of hearing defts. KaMook Banks motion to join in the other defts. Ordered motion granted. Record of further hearing defts. motion to suppress evidence. Evidence adduced. Ordered any briefs be submitted not later than 1976. Under ad. unless either side requests oral arguments. Said request s___ be made not later than March 25, 1976. Record of hearing defts. motion for covery. Evidence adduced. Record of hearing defts. general motion to suppr___ Defts. directed to submit an amended motion within a reasonable period of Record of hearing defts. motion to disclose informants A & B. Court to examine FBI Agent Little in camera. Under advisement. Record of hearing on gov. motion for trial in Pendleton, Oregon. Ordered motion

DENIED. Record of order setting arr. and plea for deft. Dennis Banks April 13, 1976 at 9AM Record of hearing defts. motion for native american judge Under Advisement

March 24 86) Filed response to gov. mem re destruction of dynamite

March 24 87) Filed transcript of motions dated 3/22/76 to Lezak 3-29-76

March 19 88) Filed govt's response to defts' motion to produce defense camp informants

March 26 89) Filed motion for permission to travel

March 26 90) Filed order that Deft. Loud Hawk, Redner and KaMook Banks be allowed to travel to and from Calif. April 1, 1976 to April 12, 1976 on the condition that they maintain daily contact. m 3/29/76 BE s 3/26/76

March 31 91) Filed & entered order suppressing evidence. Defts. motion to suppress all evidence is GRANTED m 4/1/76 BE s 3/30/76 ntfd

March 31 92) Filed order that deft. KaMook motion to join in order defts motion is GRANTED. Defts. motion for native American Judge is DENIED. Deft. motion to produce informants A & B and for a pretrial hearing is U/A. Defts motion to disclose def. camp informants is DENIED. Defts. general motion to suppress is DENIED. Defts. first motion for discovery and ins. Defense can interview officers without hinderance from gov. counsel and gov. counsel shall notify those officer whom he asked not to talk to. DEFTS. motion for disclosure of names of prospective jurors GRANTED. Defts. motion for search and disclosure of electronic or other surv. None found. Defts. motion for change in Voir Dire U/A. Defts. motion for additional preemptory challenges. U/A Defts. motion to dismiss or to suppress. Order already submitted. Gov. motion for trial in Pendleton, Oregon DENIED. m 4/1/76 BE s 3/

March 26 93) Filed supplemental affidavits in support of defts. motion to disclose electronic surc.

March 26 94) Filed supplemental affidavits in support of defts motion to produce defense camp informants

March 29 95) Filed motion to amend travel order m 4/6/76

April 5 96) Filed amended order for permission to travel m 4/6/76 BE s 4/2/76

(Nov. 26, 1975) [1976] 97) Record of finding that defts are indigent and can proceed in forma pauperis J

April 13 113) Filed defts. motion to join in motions of Dennis Banks

April 13 114) Filed defts motion for order to aid in challenge of Grand and Jury petit jury composition

April 19 115) Filed notice of Appeal by USA from the Order dated 3/30/76, filed 3/31/76 suppressing all evidence relating to dynamite

April 20 Served a copy of the Notice of Appeal on all attorneys for appellee and upon the court reporter

April 20 Notified counsel of Rule 20 (Expedited Appeal)

April 20 Mailed a certified copy of the Notice of Appeal, docket entries, and CJA Form 20 (VO #278292) to Court of Appeals

April 13116) Record of order appt. counsel for defts. as follows. for defts. Loud Hawk Ron Schiffman., for defts. Redner, Sheila Lea, for defts. Dennis Banks, Dennis Stenzei BE

April 15 117) Filed letter that the pretrial hearing set for April 29, 1976 is continued to May 3, 1976 at 9:30 AM. BE

April 19 118) Filed travel order for defts Kenneth Loud Hawk. Ordered that deft may travel to and from his family home in South Dakota between the dates of April 21, 1976 and May 5, 1976. Shall maintain contact w/attorney, and waived his personal app. at any pretrial hearings m 4/20/76 BE s 4/19/76 ntfd

April 19 119) Filed motion for permission to travel

April 20 120) Filed gov. motion for continuance DENIED 4/20/76 BE s 4/20/76

April 19 121) Filed gov. mem to motion for continuance

April 15 122) Record of in camera exam, of FBI agent LITTLE. Court examines agent little under oath. BE

April 20 123) Filed order allowing travel to Defts. Loud Hawk and KaMook Banks to travel out of the district of Oregon to the Western District of Washington on April 21, 1976 and to return April 23, 1976 in order for them to attend a speaking engagement at the Un. of Wash. in Seattle, Wash. m 4/20/76 BE s 4/20/76

April 21 124) Filed gov. Answers to deft. motion

April 21 125) Filed gov. response to defts. Banks motion for discovery etc.

April 22 126) Record of filing and sealing in chambers incamera interview of Robert Little. Box of envelope placed in file. SEALED EMV. PLACED IN VAULT. Valuables in exhibit drawer Marshs box

April 22 127) Filed defts. motion to dismiss or in the alternative for an in camera pretrial hearing

April 23 128) Filed motion to suppress personal papers and documents of all defts. seized prus. to search warrant

April 23 130) Filed supple. exhibit to defts. motion to dismiss or in the alternative a in camera pretrial hearing

April 23 131) Filed motion to quash or dismiss the ind. because of an illegally composed grand jury or because of the inability of the defts. to receive a trial by a legally composed petit jury

April 23 132) Filed motion to require that the trial of this case be held in a facility suff. large to acc. a reasonable number of members of the general public

April 26 133) Record of conference. Gov. informs court that is will not be ready for wk of 5/12/76 Ordered no further hearings to be held until decision of the of appeals on gov. appeal. Ordered motion of Kamooks Banks for leave to South Dakota from 4/26/76 to 5/2/76 granted BE

April 30 134) Filed gov. answer to defts. motion to have the trial held in a facility an enloarged [*sic*] seating capacity

May 3 135) Filed designation of record by the gov.

May 4 136) Filed gov. renewed motion for continuance or in the alternative for hearing on defts. motions to suppress and dismiss

May 4 137) Filed CJA 21 form appt. James Key

May 4 138) Filed gov. answer to defts. motion to dismiss the ind. for alleged governmental misconnduct

May 11 139) Filed gov. supplemental mem. in support of its renewed motion for a continuance of the May 12, 1976 trial date.

May 11 140) Filed gov. answer to defts. second motion to dismiss for gross gov. misconduct.

May 12 141) Filee gov. answer to defts motion for order to aid in challenge of Grand jury and petit jury composition

May 12 142) Record of time set for trial Case called and gov. informs court it is ready for trial. Defts answer ready. Gov. renews its motions for handwriting and handprinting exemplars from defts. Dennis Banks and all other evid, motion Ordered defts. motion to dismiss the ind. with prejudice pursuant to rule granted. and case dismissed as to the defts. Ordered bonds of these defts exonerated. Gov. moves to continue defts. on PR pending appeal. Ruling made Ordered gov. motion to continue subp. for gov. witnesses taken under adv.

May 14	143) Filed defts. mem. for court re dismissal with prejudice
May 14	144) Filed defts. opposition to gov. motion to extend life of subp.
May 17	145) Filed orig. + two copies of Transcript of motion had on 12/29/75
May 17	146) Filed orig. + two copies of Transcript of motion had on 1/23/76
May 17	147) Filed orig. + two copies of Transcript of motions had on 2/5/76
May 17	148) Filed Transcript of Hearing had on 4/26/76
May 17	149) Filed Transcript of Motion to Dismiss had 5/12/76
May 17	Mailed RECORD ON APPEAL as follows: 1. Three certified copies of Clerk's Record (pleadings)—pgs 1 thru 915 in Four Volumes, VOLS, I, II, III, & IV 2. Orig. + two copies of Transcript of Motion had on Dec. 23, 1975—VOL. V of Record on Appeal Orig. + two copies of Transcript of Motion had on Dec. 29, 1975—VOL. VI of Record On Appeal Orig + two copies of Transcript of Motion had on Jan 23, 1976—VOL. VII of Record On Appeal Orig + two copies of Transcript of Motions had on Feb 5, 1975—VOL. VIII of Record On Appeal Orig ± two copies of Transcript of Motion To Amend Pretrial Release Plan, had on Feb 25, 1976—VOL. IX of Record On Appeal Three copies of Transcript of Testimony of James M. Key, had on Mar 19, 1976—VOL. X of Record On Appeal Orig + two copies of Transcript of Motions had on Mar 22, 1976—VOL XI of Record On Appeal

	Orig ± two copies of Transcript of Hearing had on Apr. 26, 1976—VOL. XII of Record On Appeal Orig + two copies of Transcript of Motion To Dismiss had on May 12, 1976—VOL. XIII of Record On Appeal
May 12	Filed Notice of Appeal by USA from the Order Dismission Indictment
May 18	Served copies of the Notice of Appeal on counsel
May 18	Mailed a certified copy of the Notice of Appeal, docket entered, and CJA Form 20 to Court of Appeals
May 21	150) Filed designation of record by the gov.
May 24	151) Filed CJA 21 form appt. Chelsa Brown
May 19	149a) Filed Govt's Motion for an order continuing all subpoenas issued on behalf of the govt until disposition of the appeal or until further order of the Court
May 28	Mailed Record to Court of Appeals
June 25	Filed transcript of motions and plea of Feb. 2, 1976.
June; 25	Filed arraignment of Dennis Banks of April 13, 1976.
July 8	Filed govt's Answer to Defts' Motion to Suppress Personal Papers and Documents of all defts Seized Pursuant to Search and General Motion to Suppress
July 9	Filed Ord supplementing Record on Appeal m 7/21/76 -ntfd- s BE 7/9/76
July 9	Filed Mot for Supple Record on Appeal
Aug. 3	Filed CJA 21 Form Authorization of Transcript
Aug. 31	Filed CJA 21 authorizing services of Ronald McReary OF URECA, Inc.
Oct. 13	Rec'd CJA 20 Appointing Ronald P. Schiffman
Nov. 23	Filed Original Transcript ofProceedings on motion dated April 26, 1976
1977	
Nov. 7	ORDER from c/a denying defts-appellees' emergency mot for continuance

1978 (BECAUSE OF SUCH CONFUSION IN PREVIOUS NUMBERING AND IN READING THE DOCKET SHEET, EVERYTHING FILED AFTER THE ORDER OF REMAND WILL BE NUMBERED WITH R i.e.)

March 8 R1) ORDER of Remand—rec'd from 9th Circuit Court of Appeals

March 10 R2) Minute Order setting case for call at 9:30 a.m. 3/27/78 for the purpose of setting a hearing date to conduct an evidentiary hearing based on the Court of Appeals' order of remand. BE

March 27 R3) Rec of call: Ord case cont'd to May 9, 1978, for evidentiary hrg based on Court of Appeals' remand ord. 1½ day. Defts' presence required unless waivers filed. (BE)

Apr 21 R8) Rec of ORD: settg deft Redner's Mot for discovery at 9am 5/3/78. (BE)

Apr 26 R9) Deft Kenneth Loud Hawk Mot for issuance of subpoenas at public expense, as follows: 1) Daid Milan (2) Steven Hancock (3) Wm. Fettig (4) Lt. M. Callum (5) Edward Hansen (6) Ken Griffiths (7) Wm. Zeller (8) Dennis Lean (9) John F. McCormick (10) James E. Russell (11) Robt. Little (12) Daniel Jacobs (13) Ron McCreary, (14) Thomas Durham (15) R. Keith Bond (16) Brooks Cline (17) Thomas Durham (18) Geo. Cally (19) John Borman (20) John Doe Dilbeck (21) Robt. Marcom.

Apr 27 R10) ORD allowing deft's mot for issuance of subpoenas at public expense. s/e 4/27/78 J

May 3 R11) Motion by Deft. Loud Hawk excusing his presence from hearings pursuant to the Order of Remand by the C/A. so ORD 5/3/78 BE

R12) Affidavit of Deft Loud Hawk

May 3 R13) Rec of hrg: Mr. Roberts ex parte telephone mot for cont of the evidentiary hrg—Ord denied. BE

Rec of hrg deft Redner's mot for disc; ORD mot granted in part & govt directed to turn over to defts the FBI 302 forms in ques, not later than 5/4/78. BE

May 8 R14) Gov'ts witness list for 5/9/78.

May 9 R16) Rec of evidentiary hrg: based on C/A ord or remand; evidence adduced; ORD hrg cont'd to 5/10/78 9:30am BE.

May 10 R17) Rec of evidentiary hrg (2nd day): evidence adduced; ORD parties submit briefs & proposed findgs w/in 2 wks after transcript of this hrg is rec'd by parties; UA. BE

May 10 R18) List of exhibits & witnesses.

May 8 R19) Govt's exhibit list for 5/9/78 hrg.

June 16 R20) ORD extending time to file proposed findgs of fact to & incl 7/14/78. s/e 6/16/78 BE

July 14 R21) CJA auth for J. McCloskey for evidentiary hrg.

August 1 R23) Govt's proposed findgs of fact pursuant to 3/6/78 Ord of remand.

August 1 R24) Deft's proposed findgs of fact upon remand.

August 23 R25) CJA 21 auth investigative expneses to Browne Legal IIvestigators.

August 23 R26) Findings of fact & conclusions of law. s/e/m 8/23/78 BE

August 31 R27) Transcript of Evidentiary hrg of May 9, 10, 1978. BE

Sept. 15 Mailed trnscpt of Evid. hrg of May 9, 10, 1978 to C/A.

1980

March 17 R29) MANDATE from C/A reversing and remanding decision of district court with instructions

March 20 R30) ORD from Supreme Court that petion for Writ of Certiorari is denied.

April 2 R31) ORD that cnsl for each of dfts appear at a status call to be held before the Magistrate 9 a.m. 4/14/80 to advise court concerning out-

standing matters. Dfts need not appear Cnsl should furnish on behalf of his or her respective client their written waiver of appearance if client wishes not to appear. Assgnmt of this case to a trial judge for making the determination as to the prejudice aspect of the dismissal as to Cts 3 and 4 will be made in the near futher. s BU 4/2/80

April 16 Rec'd from C/A transcripts & exhibits (see ltr in file)

April 14 R32) Rec of hrg re all pending matters. Ord setting for s/r (9:30) 5/12/80 before trial judge. Ord that all motions be heard 5/28/80 at 9:30 a.m. before trial judge. Ord that all motions be filed w/in 2 wks. Ord reappointing Ronald Schiffman, Lynn Parkinson and Michael Bailey. Ord that defts sign new recognizance papers at district court nearest to where they are living. Finding of Excludable delay from March 17, 1980 until motions are decided. Juba

April 14 R33) List of Motions Filed But Not Decided (fld by Michael Bailey) (for defts KaMook and Dennis Banks)

April 14 R34) Waiver of Appearance for dft Dennis Banks

April 14 R35) Waiver of Personal Appearance by deft KaMook Banks

April 14 R36) Waiver of Appearance by dft Russ Redner

April 16 R37) Supplemental List of Motions Filed but not decided (fld by Lynn Parkinson)

April 24 R38) Notice of Appearance of Cnls. Kenneth Stern appears as local cnsl for Dennis Banks.
R39) Second Supplemental List of Motions Filed But Not Decided (fld by Kenneth Stern for Dennis Banks)

April 23 R40) ORD that case is assigned to Judge Redden. Schedules fixed on 4/14/80 by Judge Juba

will be adhered to, except as may be changed by Judge Redden. s BU 4/23/80

April 24 R41) Defts Mot For Enlargemt of Time to File Pre-Trial Motions (fld by atty Lynn Parkinson)

April 28 R42) Motion IN LImine (dft Loudhawk)

April 28 R43) Mot For Disclosure of Electronic Surveillance (fld by atty Parkinson)

April 28 R44) Mot To dismiss Denial of Speedy Trial (fld by Atty Michael Rose)

April 29 R45) Rec of ord granting dfts mot for enlargement of time to file pre-trial motions. Pretrial motins to be filed by 5/12/80 (note: no oppos to Mot #41 has been fld). Redden

April 29 R46) Ord Specifying Methods and cond of release (for dft Redner)

April 30 R47) Waiver of Appearance—dft Loudhawk

May 9 R48) Mot for Aptmt of National Jury Project (fld by atty for KaMook Banks)

May 12 R49) Mot To Reconsider (Mot To Produce Informants and Mot For Disclosure of the Identity of all Informants (fld by atty for Loudhawk)

May 12 R50) Dft Redner's Mot For Enlargement of Time to File Pre-TrialMotions

May 12 R51) Deft (Dennis Banks) Mot For Enlargemt of Time to File Pre-Trial Motions

May 12 R52) Supplemental Affidavit of Kenneth Stern in Support of Mot For Disclosure of Electronic or Other Surveillance (fly by atty for D. Banks)

May 12 R53) Mot To Suppress Evidence (fld by atty Kenneth Stern for all dfts)

May 12 R54) Rec of status conf:
Ord no hrg required on issue of Forewarning
Ord Non dynamite charges cannot be reinstated.
Ord Further status conf Wed. May 28, 1980 at 9:30 a.m. (RE)
Ord All motions to be fld by 5/28/80.

Ord Motions designated for hrg will be heard June 23, 1980 (RE)

Ord TRIAL DATE FIRM SEPT 3, 1980 9:30 a.m. 5-6 wks (RE)

Oral Stipulation of Cnsl regarding Excludable delay.

Crt ntfd by cnsl that Dennis Banks and Kamook Banks would sign new recog papers in Calif. 5/21/80.

Oral mot by cnsl Bailey for aptmt of Kenneth Stern to represent Dennis Banks—Affidavit of indigency to be fld (U/A)

Waivers of appearance for Dennis Banks and K. Banks re 5/12, 5/28 hrgs to be fld. (per cnsl).

Dennis Banks and K. Banks to sign new recog papers 5/21.

Ord the following previously fld and determined motions are deemed renewed by defts cnsl:

1.;zmot for inspect. reprod and copying records and papers used in Jury Procedure.

2.;zmot for disc & inspect. of Grand Jury Minutes & Testimony

3.;zmot to disclose prospective jurors.

4. Mot For issuance of subs at Public Expense.

Cnsl advised Crt that the following motions will need a hrg: June 23, 1980.

Mot for search and disclosure of electronic surveillance

Mot to dismiss statements

Mot to Suppress personal papers and documts of all dfts seized pursuant to search warrant. Mot to Suppress Hrg.

Mot for rehearing or reconsideration as to defense camp informants.

The following motions are still pending and need determination, as represented by cnsl: (excluding those listed above for hrg)

Mot for additional preemptory challenges

Mot for change in voir dire procedure

Mot for discovery, inspection and copying

Mot for discovery of evidence favorable to the dfts.

Supple mot to dfts mot for discov. Inspec. & Copying

Mot for ord to aid in challenge of grand and petit jury composition

Second mot to dismiss for gross governmental misconduct

Mot to quash or dismiss (re: jury composition)

First mot for discovery and inspection.

(Additional motions to be filed). Redden

May 12 R55) CJA 20 aptg Ronald Schiffman to represent Loud Hawk

May 12 R56) CJA 20 aptg Lynn Parkinson to represent Russ Redner

May 12 R57) CJA 20 aptg Michael Bailey to represent KaMook Banks

May 14 R58) Ord Specifyign Methods and Cond of Release

May 21 R59) Govts Response to Dfts' Mot for Disclosure of Electronic Surveillance

May 27 R60) Govts Mot to Reconsider ORD Disclosing Grand Jury Testimony

May 28 R61) Waiver of appearance by Dennis Banks and Darlene Nichols

May 28 R62) Memorandum In Support of Mot To Suppress (fld by atty Ed Jones)

May 28 R63) Ord Specifying Methods and Cond of Release (D. Banks)

May 28 R64) ORD Specifying Methods and Cond of Release (Darlene Nichols)

May 28 R65) Rec of status conf: Ord that all briefs be fld by June 9, responses to be fld w/in 12 days thereafter (cnsl to submit stipulated list of motions for determination) Ord setting hrg time 9:30 a.m. 6/23/80 on motions. Redden

May 28 R66) Dennis Banks—Mot To Dismiss For Bad Faith Prosecution

May 28 R67) Dennis Banks—Mot To Dismiss, Grand Jury Composition

May 28 R68) Dennis Banks—Mot For Change in Jury Selection Procedure

June 5 R69) Govts Ans to Dfts' Mot to Dismiss Denial of Speedy Trial

June 9 R70) Govts Ans to Defts' Mot to Reconsider (Mot to Produce Informants and Mot For Disclosure of the Identity of All Informants)

June 9 R71) Govts Second Response to Defts' Mot For Additional Preemptory Challenges

June 9 R72) Govts And to Dfts' Mot to Dismiss For Bad Faith Prosecution

June 9 R73) Govt's Second Response to Dfts' Mot For Change In Voir Dire

June 9 R74) Govts Ans to Dfts' Mot in Limine

June 9 R75) Affidavit of Cnsl—S. Lynn Parkinson

June 9 R76) Affidavit of Cnsl in Support of Motions—Michael Bailey for K. Banks

June 9 R77) Memorandum of Law: Voir Dire Procedures, Preemptory Challenges; Supporting Affidavit (fld by atty M. Rose for dfts)

June 9 R78) Memorandum of Law: Jury Composition (fld by atty M. Rose for dft Dennis Banks

June 9 R79) Mot To Amend Mot To Dismiss For Bad Faith Prosecution (fld by atty Kenneth Stern for Dennis Banks on behalf of all dfts)

June 16 R80) Govts Ans to Dfts Mot for Reconsideration or Rehearing (as to Defense Camp Informants)

June 18 R81) SUPERSEDING INDICTMENT
26 USC 5861(d) & 5871 and 18 USC 2 Possession of explosive Device; Possession of Explosive Device with No Registration COUNTS 1, 2, 3, 4

18 USC 992(k), 924(a), & 2 Possession of Firearms with Obliterated Serial Numbers COUNT 5

June 20 R82) GOVT response to dfts' motion for appointmt of National Jury Project.

R83) GOVT answer to dfts' mot to suppress and motion to suppress personal papers and documents of all Dfts seized pursuant to Search Warrant.

R84) GOVT answer to dfts' mot for change in jury selection procedure.

June 24 R85) Affid of Kenneth Stern in support of mot to reconsider Disclosure of Defense Camp Informants and mot for Discovery and Inspection.

June 23 R86) Rec of arraignmt of Kenneth Loudhawk on Superseding Indictmt fld 6/18/80. Plea of NG entered by dft to cts 1-5. Trial date of Sept 3 (firm). Record of hrg motions—witnesses sworn, evid adduced—see separate list of witnesses and exhibits. Ord continuing hrg to 6/24/80 at 10:30 a.m. Ord granting exclusion of witnesses from the courtroom. SEE ATTACHED LIST OF MOTIONS. Ord taking U/A the following motions:

1. Govt Mot to Reconsider Ord Disclosing Grand Jury Testimony
2. Mot to Suppress (Stop Issue)
3. Mot to Suppress (Warrnat)
14. Mot for Rehearing or Reconsideration.

Remaining dfts to be arraigned on Aug 5, or 10 days prior to trial. Redden

June 24 R87) List of Exhibits and Witnesses for Mot to Suppress

June 24 R88) Rec of continuation of hrg pending motions: Ord that additional motions be filed by July 3, 1980; briefs to be fld by July 14; Argumt Aug 5 at 9:30 a.m. Ord granting dfts mot for transcript of Evid. portion of hrg 6/23. Briefs on evid hrg to be fld w/in 1 wk after de-

livery of transcript. Ord granting dft Loudhawk's oral mot (by cnsl) for waiver of appearance at future pretrial hrgs. Govt to advise Court if Peltier will be tried Sept 3, 1980.

Disposition of motions not under advisemt: (see numbered list of motions attached to June 23 minute order-R86)

#5 New motion in Limine to be fld.
#6 to be considered later
#7 to be considered later
#8 to be considered later
#9 "
#10 "
#11 "
#12 "
#13 "
#14 &#15 ruling delayed
#16 U/A
#17 new motion to be filed
#18 to be considered later
#19 determined as moot
#20 dfts to file new motion
#21 to be considered later
#22 U/A
#23 to be considere dlater
#24 "
#25 determined as moot—cnsl to proceed against new indictmt. Redden

June 27 R89) ORDER—re motions heard June 23-24, 1980.

Re Mot to Reconsider Ord Disclosing Grand Jury Test.—The Grand Jury test shall be turned over to dfts after the proceedings have been transcribed.

Re Mot to Recnosider Disclosure of Defense Camp Informants—govt shall provide crt w/informant files and lists in this case for an *in camera* inspection.

Mot For Issuance of Subs at Public Expense—Ord Granting

Mot For Disclosure of Names of Prospective Jurors—Mot Granted.

Names of prospective jurors will be made availabe to dfts 3 wks before trial.

Mot For Ord to Aid Challenge of Grand and Petit Jury Composition—Mot granted in part as to petit jury. Redden

June 30 R90) Dfts' Mot For Enlargemt of Time to File Pre-Trial Motions (fld by atty Stern on behalf of all dfts)

July 3 R91) Rec of ord GRANTING DFTS' Motion For Enlargement to Time to File Pre Trial Motions to July 7, 1980. Ord Granting Govt Mot For Extension of Time to Respond to July 24, 1980.

July 7 R92) Mot To Dismiss Cts 3 and 4 for Insufficient Allegations (fld by atty Parkinson—atty for Redner on behalf of dfts)

July 7 R93) Mot To Suppress Evidence of Pretrial Photographic Identification and Tainted Potential Courtroom Identification (fld by atty Parkinson—atty for Redner of behalf of dfts)

July 7 R94) Transcript of Testimony dated June 23, 1980 before Judge Redden

July 7 R95) Mot For change in Jury Selection Procedure (Dennis Banks)

July 7 R96) Mot To Dismiss: Grand Jury Composition (Dennis Banks)

July 7 R97) Mot To Dismiss For Vindictive Prosecution (Dennis Banks)

July 7 R98) Second Mot In Limine (Dft Loudhawk)

July 7 R99) Mot To Dismiss For Preindictmt Delay (KaMook Banks)

July 14 R100) Dfts' Memorandum Re: Founded Suspicion (fld by Ed Jones for dfts)

July 14 R101) ORD RE interim Payments For Representation of Assigned Cnsl—Finding that due

to nature of complexity of this case the compensation for services to be provided by cnsl is virtually certain to exceed the $1,000 limit for all cnsl. s Redden 6/25/80 approved 7/1/80 Browning

July 21 R102) Motion For Disclosure and Production (D. Banks)

July 21 R103) Mot For Aptmt of Investigator at Govt Expense (Dennis Banks)

July 21 R104) Affidavits in Support of Mot for Aptmt of Investigator at govt Expense: Mot For Disclosure and Production, and; THIRD MOTION TO DISMISS For gross governmental Misconduct

July 21 R105) Third Motion To Dismiss For Gross Governmental Misconduct (Dennis Banks)

July 24 R106) Govts Response to Dfts' Mot For Change in Jury Selection Procedure (fld 7/7/80)

July 24 R107) Govt's Ans to Dfts Mot To Suppress Photographic Identification and Tainted Potential Courtroom Identification

July 24 R108) Govt's Ans to dfts mot to Dismiss for Pre-Indictmt Delay

July 24 R109) Govt's ans to dfts Mot To Dismiss Cts 3 and 4 for Insufficient Allegations

July 24 R110) Govt's Ans to Dfts Second Mot in Limine

July 24 R111) Govt's Response to Dfts Mot to Dismiss: Grand Jury Compsition (Fld 7/7/80)

July 24 R112) Govts Ans to Dfts' Mot To Dismiss For Vindictive Prosecution

July 25 R113) ORDER—

Dfts Mot To Suppress is Denied.

Mot To Suppress Personal Papers and Documts of Dfts Seized Under Search Warrant is Denied.

Mot To Reconsider Mot To Disclose Informants A & B is Denied in Part.

An *in camera* session shall be conducted w/ cnsl for govt and FBI agent familiar w/ Informants

A & Bs' role, the transcript of the proceedings shall be sealed and made a part of the record s RE 7/22/80 m 7/25/80 ent 7/28/80

July 28 R114) Mot To Quash Indictment or, In the Alternative, To Strike (fld by atty for Dennis Banks on behalf of all dfts)

August 4 R115) Govt's Ans to Dfts Mot For Appointment of Investigator at Govt Expense

August 4 R116) Govt's Ans to Dfts Third Mot To Dismiss For Gross Governmental Misconduct

August 5 R117) Govt's Ans to Dfts Mot To Quash Indctmt or, In the Alternative, To Strike

August 5 R118) Rec of hrg motions:

Motion to Dismiss for vindictive prosecution—Witness sworn: C. Turner

Mot to Dismiss for pre-indictmt delay

Motion (Second) In limine

Mot to Dismiss Counts III & IV for insufficient allegations

Mot to Suppress Evid of Pretrial photographic identification and tainted potential courtroom identification; Witness sworn:

Daniel S. Jacobs; Exhibs: Govt. A-1, A-2, A-3 (7 photos. Wanted Flyer Peltier and Wanted Flyer Blackhorse)

ORDER taking motion U/A.

Additional dfts to be arraigned 5 days prior to trial.

Ord continuing hrg to August 12, 1980 at 9:30 a.m. RE.

Sealed envelope continuing inventory of breafcase, returned to the custody of the Clerk, U.S. District Court—VAULT—5th Floor, cabinet 5 drawer B

August 8 R119) CJA 21 authorizing services of Jerry Harris, Court reporter

August 8 R120) ORD regarding motions in documt #R118:

Motion To Dismiss for Vindictive Prosecution:

The Motion to Dismiss is *Denied except* as to Dft KaMook Banks (Kamook Banks is dismissed)

Mot to Dismiss for Prc-Indictment Delay

The Motion is denied.

Second Motion in Limine:

The Motion as to Dft Dennis Banks is denied. Because of previous ruling, this motion is Moot as to KaMook Banks. The mot as to evidence relating to search for and attempt to arrest dfts Banks and Peltier is grnated in part. Govt may only introduce evidence of events which occurred at the scene of the alleged crime.

Mot to Dismiss Counts III and IV for Insufficient Allegations

The motion is denied.

Mot To Suppress Photographic Identification and Potential Tainted Courtroom Identification

The motion is denied.

Mot For Appointment of Investigator at Govt Expense

The motion is denied. m/ s REDDEN 8/8/80 ent 8/11/80

August 8 R121) ORD that the case of Leonard Peltier is severed from the remaining dfts. s Redden 8/8/80

August 12 R122) AMENDED ORD—Page 1-2, 3, lines 1-22 of the ORDER dated August 8, 1980 (documt #R120) is amended re: Mot To Dismiss for Vindictive Prosecution—see Amended Ord. s/m/e 8/12/80 REDDEN

August 12 R123) Rec of ord setting pretrial conf August 25, 1980 at 10:30 a.m. before Judge Redden, Courtroom #1, 6th floor

August 12 R124) Rec of hrg motions:

1) First Mot to Dismiss for Gross Governmental Misconduct ORD Denying Motion
2) Second Mot to Dismiss for Gross Governmental Misconduct ORD Denying Motion

3) Third Mot to Dismiss for Gross Governmental Misconduct ORD this mot to be considered at a later date.
4) Mot to Quash or, in the alternative to Strike ORD Denying MOT
5) Mot to Dismiss for Bad Faith Prosecution MOT W/Drawn
6) Mot for Search and Disclosure of Electronic or Other Surveillance. ORD this mot to be heard later
7) Mot in Limine ORD this mot to be heard later
8) Mot for Change in Jury Selection Procedure, Mot to Dismiss Grand Jury composition. ORD denying motins w/ leave to renew
9) Mot to Dismiss, Denial of Speedy Trial ORD denying motion.
10) Mot for Aptmt of National Jury Project., ORD Denying Motion.
11) Mot for Aptmt of Investigator (ex parte hrg) ORD taking motion U/A. RE

August 15 R125) D. BANKS—Notice of Appeal from ord entered 8/12/80

August 14 R126) Rec of reconsideration of ord denying dfts mot for aptmt of Investigator at Govt Expense. ORD Granting dfts mot for aptmt of Investigator at expense of Govt. RE

August 14 R127) Rec of ord that dfts cnsl be furnished a list of prospective jurors w/ addresses of same. RE

August 15 R128) Ex Parte Mot for Stay of Proceedings (D. Banks) until such time as C/A decides issued of Appeal of Amended Ord Denying dfts Mot to Dismiss for Vindictive Prosecution

August 15 R129) Rec of ord granting dft Dennis Banks' ex parte motion for stay of proceedings. RE

August 21 R130) Notice of Appeal from dft Redner from amended or dentered 8/12/80

August 21 R131) Designation of Reporters Transcript—Dennis Banks

August 22 R132) CJA 20 authorizing services of Kenneth Stern

August 22 R133) NOTICE OF APPEAL from dft. Loudhawk from the order entered August 12, 1980.
No fees pd—appointed counsel.
Mailee copy of notice of appeal to Schiffman, Youngsman, USM, probation, Bailey, Sterns, Mr. Loud Hawk, & Parkinson.
Mailed copy of notice of appeal, docket, order of appointment to court of appeals.

August 23 R134) Designation of Reporters Transcript (Redner)

August 26 R135) Ex-Parte Mot For Aptmt of Cnsl on Appeal and Paymt of Transcript Production With Supporting Affidavit (dft Redner)

August 26 R136) Affidavit of Cnsl (Redner)

August 26 R137) Rec of ord striking trial date and staying proceedings as to all dfts—pending appeal. RE

August 29 R138) Rec of ord denying dfts mot to reconsider mot to produce informants and mot for disclosure of the identity of all informants. RE

Sept. 2 R139) Notice of Appeal (dft KaMook Banks)

Sept. 3 R140) Designation of Transcript (Loudhawk)

Sept. 4 R141) Motion To Dismiss, w/ attached Mot for Oral Argumt on Mot to Dismiss, Mot to Allow Dft to Serve as Co-Cnsl, (dft Peltier) fld by atty Jack L. Schwartz

Sept. 3 R142) Mot For Aptmt of Cnsl on Appeal (Loudhawk moves for aptmt of Schiffman)

Sept. 4 R143) Rec of ord granting mot of dft Russ Redner for aptmt of Lynn Parkinson as cnsl for purposes of appeal. Rec or- ord granting mot to Loudhawk for aptmt of Ronald Schiffman as cnsl for purpose of appeal. Further ord granting preparation of transcripts at govt expense

Sept. 8 R144) ORD for Time Schedule from C/A (dft Loudhawk)

Sept. 8 R145) Ord for Time Schedule from C/A (dft Redner)

Sept. 8 R146) Ord for Time Schedule from C/A (dft Banks, Dennis)

Sept. 10 R147) Ex Parte Mot for Aptmt of Cnsl on Appeal and Paymt of Transcrpt Production (Dennis Banks)

Sept. 10 R148) Rec of ord Granting dft Dennis James Banks' mot for aptmt of cnsl on appeal and paymt of transcript production at govt expense. RE

Sept. 12 R149) ORD from time schedule from C/A

Sept. 17 R150) KaMook Banks—Designation of Transcript

Sept. 24 R151) Transcript of Proceedings dated May 12, 28, 1980 before Judge Redden

Sept. 24 R152) Transcript of Proceedings of the Testimony of Sidney Rubin dated June 23, 1980 before Judge Redden
R153) Transcript of Hrg on Motions dated June 24, 1980 before Judge Redden
R154) Transcript of Hrg on Motions dated Aug 5 and Aug 12, 1980 before Judge Redden

Sept 25 R155) Supplemental Designation of Transcript

Sept. 26 R156) Transcript of Proceedings dated 11/18/75 before Judge Juba

Sept. 26 R157) Transcript of Proceedings dated 11/26/75 before Judge Juba

Sept. 26 R158) Transcript of Proceedings dated 12/8/75 before Judge Juba

Sept. 26 R159) Transcript of Proceedings dated 4/14/80 before Judge Juba

Oct. 2 R160) Discovery Material Provided By the Govt (Volume I and II)

Oct. 6 R161) Ord from C/A that appellant's mot of Sept. 25, 1980 for extension of time to file opening brief is granted.

Oct. 15 R162) Appellants designation of clerks record received.

Oct. 22 R163) Appellees designation of clerks record received.

Oct. 23 Mailed record on appeal to court of appeals.

Oct. 16 R162a) CJA 20 appointing Ronald Schiffman.

1981

Feb. 3 R181) CJA 20 aptg Ronald Schiffman for Loud Hawk FINAL VOUCHER
R182) CJA 20 aptg Lynn Parkinson for Russ Redner FINAL VOUCHER
R183) CJA 20 aptg Kenneth Stern for Dennis Banks FINAL VOUCHER
R184) CJA 20 aptg Michael Bailey for Ka-Mook Banks FINAL VOUCHER

March 9 R186) Mot for ORD Dismissing Indictmt as to dft Peltier. SO ORD s Redden 3/7/81 m/e 3/10/81

June 1 R187) CJA 20 aptg Jack L. Schwartz for Leonard Peltier

1982

Oct. 18 R188) ORD from C/A that appelant's mot for substitution of counsel is granted. Kenneth S. Stern will be appointed by separate order.
R189) CJA 20 aptg Kenneth Stern for Loud Hawk.

1983

Jan. 31 R190) MANDATE from C/A. Appeals are dismissed as to appellants Dennis Banks, Redner and Loud Hawk for lack of jurisdiction; reversed in part as to appellant Ka-Mook Banks.
R191) ORD from S/C. Petition for a writ of certiorari is denied.

Feb. 1 R193) ORD setting status conf. Mon., 2/14/83 at 3:00 p.m. before Judge Redden.

Feb. 3 R194) ORD striking Status Conf of 2/14/83 & RESETTING to Wed., 3/9/83 at 9:00 A.M. before Judge Redden.

Feb. 18 R195) ORD changing time only to 1:00 p.m. for Stat. Hrg. 3/9/83

Feb. 25 R196) Rec of ord—setting trial date April 11, 1983 commencing at 9:30 a.m. RE

Mar. 1 R197) Mot for ORD of Ex Delay. AUSA moves for ORD extending time for trial to commence between wk of May 16, 1983 and Aug 8, 1983,—Affidavit attached.

Mar. 9 R198) Rec of ord setting following sched:
March 24, 1983 8:30—Status conference regarding discovery, hrg on dfts mot for aptmt of expert to assist in jury selection, and hrg on other jury motions pending, hrg on dfts mot for search & disclosure of electronic or other surveillance.
Order—dfts to file any new motions by March 21, govt response due March 28. Hrg April 6, 1983 9:30 a.m. Arraignment of dfts on this date unless cnsl file the necessary motions 30 days prior to this date. (Hrg on dfts mot in limine and 3rd mot to dismiss for govt misconduct).
Ord *Trial* of this case shall commence *May 3, 1983 at 9:30* (jury 10 days) (Strike trial date of 4/11) RE
Ord denying Mr. Schiffman's oral mot to be relieved as cnsl for Mr. Loud Hawk. RE

Mar. 10 R199) Rec of in camera submission of documents relating to dfts' mot to determine electronic surveillance. Govts. response submitted. Sealed documents submitted to Court for in camera inspect. RE
R200) Notice of In Camera Submission—fld by Charles Turner, USAtty
R201) Govts Response to Dfts Second Mot For Disclosure of Electronic Surveillance

Mar. 14 R202) Letter from Judge Redden to Kenneth Stern re Ex Parte Motions for Investigative Services and Travel Expenses.

Mar. 15 R203) ORD the in camera proceedings before the Court on March 10, 1983 are sealed until further ord of Court s RE 3/14/83

Mar. 17 R204) Reporter's Transcript of Proceedings of March 10, 1983 Sealed by ORD of Judge Redden (In Camera Proceedings)

Mar. 17 R205) Govt's Mot for Discovery Pursuant to Rule 16(b), FRCP

Mar. 17 R206) Transcript of Proceedings dated March 9, 1983 before Judge Redden

Mar. 18 R207) Ex Parte Mot for Authorization of Travel Expenses under 18 USC 3006A(e) (fld by Stern) (see letter doc#R202)

Mar. 18 R208) Ex Parte Mot for Authorization of Investigative Services (see letter doc#202)

Mar. 21 R209) OPINION and ORD that contents of the sealed exhibit shall not be disclosed. s/RE 3/21/83

R210) Mot to dismiss for abuse of Grand Jury process (filed by Parkinson of behalf of all dfts.)

R211) Motion for order requiring discovery (filed by Parkinson on behalf of all dfts).

R212) Motion to dismiss for continued litigation is overly burdensome on the court and all parties (filed by Parkinson on behalf of all defts).

R213) Discovery motion/Brady Material (filed by Parkinson on behalf of all dfts).

Mar. 21 R214) Ex Parte Motion for appointment of expert to assist defense and conduct of voir dire (Redner and Dennis Banks).

R215) Exhibit in Support of Dfts' (various) jury selection motions and for appointment of expert (filed by Steenson on behalf of all dfts).

R216) Motion for Trial in absentia or in the alternative, Motion for trial with dft's electronic presence (Dennis Banks).

March 22 R217) Ex Parte ORD: travel expenses for counsel under CJA not to exceed $600.00 are hereby ordered. No excludable delay has occurred in connection with this matter. s/RE 3/22/83. (Denniss Banks)

R218) Rec of conf w/counsel. Court rptr present for reporting presence of counsel. ORD striking hrgs scheduled 3/24/83 and 4/6/83.

March 23 R219) Rec of ORD: All responses and herings on motions are deferred until further order of the court. RE

March 31 R220) Waiver of Appearance of Kamook and Dennis Banks.

R221) Waiver of 30-day time limit between arraignment and trial. (Kamook Banks)

R222) Waiver of 30 day time limit between arraignment and trial. (Dennis Banks).

April 11 R223) Recof ORD: striking trial date May 3, 1983 and setting trial date of May 23, 1983. All motions to be filed by April 20, 1983. Mot hrg set May 9, 1983 at 2:00 p.m.

April 19 R224) Rec of ORD: setting conf. w/counsel Wed. April 20, 1983 at 1:30 p.m.

April 20 R225) Rec of Status Conf: Ord all motions together w/ supporting memorandum to be filed by 4/22 together w/ list of motions to be argued. ORD PTC 4/27 1:30 (re Banks dfts) ORD Govt resp to motions due 4/27. ORAL ARg 4/29/83 at 1:30 p.m. ORD EVID HRG May 6, 1983 (re jury motions) ORD PTC set May 16, 1983 and May 23, 1983 at 1:30 p.m. **TRIAL DATE JUNE 13, 1983 9:00 a.m.* (7-10 days jury) RE

April 22 R226) Govts Ans to DFts MOt For Discovery

April 22 R227) Supplemental Exhibits In Support of Mot For Trial in Absentia (fld by atty Stern for D. Banks)

April 22 R228) Memo of Law in Support of dfts' Mot to Dismiss for Abuse of Grand Jury Process (filed by atty Parkinson for all dfts).

April 22 R229) Memo of Law/Speedy Trial (filed by atty Rose for all dfts)

April 22 R230) Mot to Reconsider or Renew Dfts' Motions for Discovery of Defense Camp Informants (filed by atty Parkinson for Redner)

April 25 R231) Mot to Strike or in the alternative to Compel Election (filed by atty Schiffman for all dfts).

April 27 R232) Govts Ans to Dfts' Mot to Strike Cts 3 and 4 or in the alternative to Elect as to Cts 1 and 2; and 3 and 4

April 27 R233) Govts Ans to Dfts' Mot for Discovery

April 27 R234) Govts Ans to Dfts Mot to Dismiss Because Continued Litigation is Overly Burdensome

April 27 R235) Govts Ans to Dfts Mot for Brady Material

April 27 R236) Govts Ans to Dfts' Renewed Mot for Disclosure of Defense Camp Informants

R237) Govts Ans to Defts' Mot to Dismiss for An Abuse of The Grand Jury Process.

R238) Rec of CONF: Rec of ex party hrg mot for apptmt of expert to conduct independent poll re: voir dire of prospective jurors.

ORD taking U/A. RE

April 28 R239) Govt ANS to Dfts' MOT to dismiss for delay of trial.

April 29 R240) Rec of mot hrg. Hrg held on mot for further exculpatory matters, mot re defense camp informat and mot re defense camp informant and mot for dismissal. Ord ruling deferred; affidavits from counsel to be submitted as soon as possible. If further argument is needed, it will be sched. 5/6/-83.

ORD granting MOT for appt of expert to assist in poll in part, limited to amt of $7500 and subject to approval of Judge Browning.

ORD setting argument on Mot to Dismiss (Loudhawk) for 5/6/83 (tentatively).

R241) Affidavit of counsel in Support of Mot to Dismiss (Pretrial delay) (filed by Schiffman)

R242) Affidavit (filed by Rose)

May 2 R243) ORD granting dft's mot for appt of expert to assist in poll, except that the total authorization is limited to $7,500. S/RE 5/2/83

May 4 R224) Mot to Strike Cts I-IV Insufficiency of Indictmt (fld by atty Schiffman for Loud Hawk)

May 6 R245) Rec of mot hrg. Dfts' Rule 16 mot for discovery—denied.

Defts' mot to dismiss (Grand Jury Misconduct)—denied.

Deft's mot to dismiss (Burdensome)—denied.

Defts' mot to Strike/Elect counts-U/A

Defts' mot for additional preempt. challenges—granted.

Gvt's mot for reciprocal discovery—granted.

Dfts' mot to change voir dire procedure—U/A.

Rule 16 mot for discovery—Govt submitted documents—except for witness statements. Affidavit of Mr. Parkinson submitted for in camera inspection, dfts Banks joined in affidavit. RE

May 9 R246) Affidavit of Counsel for Dft Redner in Support of Mot to Dismiss (Pretrial Delay).

May 9 R247) Affidavit submitted for in camera inspection. Affidavit of L. Parkinson in support of Mot to Dismiss (pretrial delay) (sealed per RE 5/9/83)

May 12 R248) ORD granting motion for aptmt of expert—Northwest Attitudes and Social Research, Inc. and Cogan and Associates to conduct research project in aid to jury selection. Total authorization is limited to $7,500. s RE 5/2/83 SO ORD s James R. Browning, Chief Judge U.S. C/A 5/5/83

May 12 R249) Govts Ans to Dfts Mot to Strike Cts 1, 2, 3 and 4 for failure to State a Crime

May 16 R250) CJA 20 authorizing payment to Stern. (D. Banks).

R251) CJA 20 authorizing payment to Parkinson (Redner)

R252) Rec of hrg on pending motions. ORD that voir dire, jury inst., trial memos be submitted by 6/6/83.
Mot to dismiss (pretrial delay)—U/A.
Mot re further exculp. matters—U/A.
Mot for disclosure of defense camp informants—denied.
Mot to strike or cause govt to elect—denied.
Mot for change in voir dire proceedings—U/A
Mots in limine—U/A
Mot to dismiss (failure to state crime)—U/A
Govt's mot to have access to in camera affidavit of Parkinson—denied.
Mot for native american judge—Judge Belloni's ruling still stands.

May 19 ORD that govt is authorized to withdraw from Clerk all exhibits entered into evidence by govt during the various pretrial hrgs for preparation for trial and to be used during trial. s/RE 5/19/83

R254) ORD that govt is authorized to offer into evidence and to otherwise use any transcripts of proceedings before Grand Jury which returned the 6/18/80 Superseding Indct. during any proceedings involving proposed pleas of guilty by dfts Dennis Banks and KaMook Banks. s/RE 5/19/83

May 20 R255) (Dfts') Mot for Discovery.

May 20 R256) (Dfts') Memo is Support of Mot for Discovery.

May 20 R257) (Dfts') Ex Parte Mot for Authorization of Transcript Duplication Expenses under 18 USC 3006(A)(e). SO ORD RE 5/20/83

May 20 R258) Rec of ORD: ORD that defts' mot for Further Exculpatory Matter is denied based on the govt's assurance that it has produced all exculpatory materials.
Dfts' Mot to Dismiss for Failure to State a Crime—Denied
Dfts' Mot in Limine—Denied

Dfts' mot for Change in Voir Dire—Denied as moot.
Dft D. Banks' Mot for Trial in Absentia—Denied as Moot.

May 20 R259) OPINION that indictment is dismissed with prejudice as to all dfts. s/RE 5/20/83 m/e 5/20/83

May 20 R260) ORD that dfts' Mot to Dismiss is Granted. The indictment is dismissed w/prejudice as to all dfts. s/RE m/e 5/20/83

May 27 R261) (Govt's) Mot continuing each of the subpoenas previously served on its prospective witnesses pending resolution of any appellate proceedings or until further ord of ct. SO ORD RE 5/27/83

R262) (Govt's) Mot for ord auth it to depose each of its prospective witnesses in order to preserve their testimony for use at trial pursuant to Rule 51(a), Fed. R. Cr. P. SO ORD RE 5/27/83

June 2 R263) (Govt's) Mot for an order directing Clerk to file the orig of Govt's response to the proposed plea procedure by dft Dennis Banks.

June 2 R264) (Govt's) Mot for an order directing the court rptr to transcribe proceedings of March 10, 1983, April 8, 1983, April 20, 1983, April 27, 1983, April 29, 1983, May 6, 1983 and May 16, 1983.

June 3 R265) Rec of Ord: setting aside orders entered May 27 (R261 and R262) (see minute entry). RE
Ord setting Status Conf and mot hrg (re document #R263, R264, R261 and R266) before Judge Redden 6/24/83 at 9:30 a.m.

June 7 R267) Rec of ORD: striking hrg scheduled for June 24, 1983 and resetting to June 30, 1983 at 12:00 noon.
Dfts allowed until 6/28/83 to file responses to motions. RE

June 13 R268) Govt's Objection tothe Continuance in the 6/24/83 Hrg.

June 14 R269) Govt's Memo in Support of Post Dismissal Motions.

June 17 R270) NOTICE OF APPEAL—by Govt from ORD dated May 20, 1983 dismissing Indictmt. no fees paid.

June 17 R271) Ord For Time Schedule

June 17 Mld copy of N/A to dft, USM, defense cnsl, & AUSA

June 17 Mld copy of N/A, dkt and ord to C/A

June 17 R272) Rec of ORD: that the govt's request to strike the 6/30 hrg and reset it to 6/24/83 is DENIED. RE

June 20 R273) CJA Frm 20 authorizing payment to Parkinson (for dft Redner)

June 23 R274) Response to Govts Motions to Depose and To Continue Subpoenas

June 24 R275) Rec of Ord: rescheduling hearing from 12:00 noon to 11:00 a.m. 6/30/83. RE

June 28 R276) Response to Govt's Post-Dismissal Motions (filed on behalf of Dennis Banks, KoMook Banks and Loudhawk).

June 29 R277) Transcript of Proceedings dated April 29, 1983, May 6, and May 16, 1983 before Judge Redden

June 30 R278) Rec of hrg govts motions to Depose Witnesses, Continue subpoenas, Transcribe In Chambers Proceedings, and Mot For Ord to file Govts Response to Proposed Plea Procedure re Dennis J. Banks (4 motions). Ord taking U/A. RE

June 30 R279) Letter from Charles Turner, US Atty re hrg of June 30, 1983.

March 21 (out of order) R216a) Mot to Dismiss For Delay of Trial—fld by atty Stern on behalf of all defts.

July 1 R280) (Govt's) Transcript Designation and Ordering Form.

July 5 R281) ORDER declining the rule of govts motions filed after the appeal. s RE 7/5/83

July 5 R282) Letter from Kenneth Stern re AUSA request to transcribe confidential proceedings.

July 6 R283) Transcript of Proceedings dated June 30, 1983 before Judge Redden

July 11 R284) Transcript of Proceedings dated March 3, 1976 before Judge Juba

July 19 R285) Transcript Designation and Ordering Form

July 28 R286) Transcript of Grand Jury Testimony of Clayton Kramer, Steven L. Hancock, David Milam and James Karolides of 6/17/80.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 75-296-2

UNITED STATES OF AMERICA, PLAINTIFF

v.

RUSS JAMES REDNER, DEFENDANT

RELEVANT DOCKET ENTRIES

11-17-75	Filed complaint and issued warrant.
11-18-75	First appearance Deft. admitted identity and was advised of rights. Order setting for preliminary hearing Nov. 26, 1975, 9:30 a.m.
11-19-75	Filed Warrant with return showing arrest of deft. by FBI on 11-14-75.
11-25-75	Indictment returned.
11-26-75	CLOSED-to Clerk's Office.
Nov. 25	( ) Filed Indictment
Nov. 25	6) Issued warrant for arrest of deft ($100,000 cash or corp surety requested)
Nov. 20	( ) Filed defts' Motion for Pretrial Release
Nov. 26	( ) Record of arraignment: Ms. Iea and Mr. Schiffman will serve as counsel without fee. Defts waived reading of the indictment. (Court summarized charges.) Defts were advised of rights. Order setting for plea 12/8/75 and bail motion J
Nov. 26	7) Filed return of service of bench warrant exec 11/26/75
Dec. 8	8) Record of entry of Plea of Loud Hawk and Redner. Pleas of NOT GUILTY entered to each of cts 1 thru 9 by each deft. Order setting for trial week of 2/9/76 2 wks jury. Order that pretrial motions be filed prior to Christmas. Order allowing motion for appt. of investigators defense counsel to prepare forms.

	Record of hearing on bail motion. Defts. witness Gregory Lynch. Order reinstating bail to $50,000.00 J
Dec. 8	9) Filed motion for contact visits
Dec. 9	10) Filed findings and order that defts motion for release is DENIED., and bail is set in the amount of $50,000.00 m 12/17/75., J s 12/9/75
Dec. 9	11) Filed order that defts. motion for an order requiring the US Marshal his agents and employees to permit contact visits with their friends and family., is DENIED m12/17/75., J s 12/9/75
Dec. 15	Filed defts motion to review and amend the conditions of release and for formal evidentiary bail hearing
Dec. 22	FILED SUPERSEDING INDICTMENT
Dec. 22	Issued warrant for arrest of deft. ($50,000.00 cash of corp. surety)
Dec. 22	Record of order setting arr. and plea for 12/29/75 RCB
Dec. 23	Filed gov. motion to compel handwriting exemplars
Dec. 23	Filed defts. motion to suppress
Dec. 24	Filed defts. first motion for discovery and inspection
Dec. 24	Filed defts. motion for a bill of particulars
Dec. 24	Filed defts. motion to dismiss or to suppress
Dec. 24	Filed motion to disclose informants
Dec. 24	Filed defts. motion for inspection reproduction and copying of records and papers used in connection with jury selection process
Dec. 24	Filed defts motion to review and amend order regarding contact visits and motion for contact meetings with potential defense witnesses
Dec. 24	Filed defts motion for search and disclosure of electronic or other surveillance

Dec. 29 Record of arr. and pleas of NOT GUILTY entered as to each ct. 4 cts. of the indictment by defts. LOUD HAWK and REDNER Ordered trial set for the wk of 2/9/76 Ordered deft. file any additional motions not later than 1/12/76. Gov. allowed 2 wks to reply and defts. may reply within 1 wk. Hearing dated for motions set 1/23/76 at 9:30 AM. Record of hearing defts. motion for reduction of bail. Evidence adduced. Bail planto be submitted to the court. Motion taken under advisement

Dec. 29 Filed return of warrant of arrest dated 12/22/75 exec. 12/29/75

1975

Dec. 31 Filed order requiring the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof in the amount of $50,000.00 see order for more details m 12/31/75., ntfd RCB s 12/31/75

1976

Jan. 8 Record of hearing on govt. motion for handwriting exempars. Order granting with protective order that exemplars only be used in this case in Oregon To be taken 1/9/76., in Marshals office. Record of hearing onmotion for contact visits today. Order allowing

Jan. 8 Filed order that defts. Loud Hawk and Redner are to furnish the FBI with handpring and handwriting samples which are to be used solely as a standard of comparison in order to determine whether or not they or both of them are the author of certain writings etc. m 11/9/76 J1/8/76

Jan. 12 Filed defts. motion to compel the transcription of all future grand jury proceedings concerning these defts.

Jan. 12 Filed defts. motion for disclosure and inspection of grand jury minuts and testimony

Jan.;lt12 Filed defts. motion for disclosure of names of prosepecitive jurors

Jan. 12 Filed defts. first amended motion for a bill of particulars

Jan. 12 Filed defts. motion to strike

Jan. 12 Filed defts. motion to sever

Jan. 12 Filed gov. response to defts LOUD HAWK AND REDNER motions: For inspection reproduction, and copying of records and papers used in connection with jury selection process; for search and disclosure of electronic and other surveillance; to disclose informants to dismiss or suppress; for discovery and inspection to suppress; for a bill of pariculars

Jan. 14 Filed gov. motion to move the court for an order to show cause directing Kenneth Loud Haw and Russ Redner to show cause why they should not be held in contempt for refusal to furnish handwriting exemplars as directed by the court.

Jan. 16 Filed return of summons and instructions exec. 1/15/76

Jan. 20 Filed defts. reply on motion to disclose informants

Jan. 20 Filed reply to gov. response to motion to suppress or dismiss

Jan. 21 Record of pre hearing conference. Court may examine the Oregon State Police reports in camera if the gov. does not disclose these maerials. Trial to be reset to 3/8/76 on motion of the defts. Gov. requests for contempt hearing will be heard after the trial if this remains be an issue. Counsel stipulate that all motions will be filed not later than 1/28/76 except jurisdictional motions which may be filed later.

Jan. 23 Record of hearing defts. motions to dismiss cts 1,2 and 3 of the ind. in the alternative to supress. Motion to disclose informants and motion for search and disclosure of electronic

or other surveilance and motion of disclosure and inspection of grand jury minutes and testimony and motion strike language in cts. 1,2 and 3. of the ind. Ordered motions taken U/A/ Record of hearing defts. motions first motion for disclosure and inspect and motion for inspection reproduction and copying of records and papers used in connection with the jury selection process. Counsel inform court these matters babe been or will be satisfied. Record of hearing defts. motion to sever the trial from trial of Banks and Peitier, Ordered motion 2granted. 1Record of hearing defts. motion to require gov. to disclose names of witnesses before grand jury *granted*. Record of hearing defts. motion to compel transcription of all future grand jury proceedings concerning these defts. *sgranted*. Record of hearing defts. motion for continuance of trial. Ordered motion *GRANTED*. and case continued from 2/9/76 to the firm date of 3/8/76 Ordered all motions be filed not later than 1/28/76 except jurisdictional motions. Record of hearing defts. motion for disclosure of names and addresses of prospective jury panel *Under advisement*, but if this motion granted the names and addresses will not be disclosed prior to one wk before trial. Gov. motion for OSC re contempt will be heard after the trial. Counsel inform court that defts motion for bill of particulars is MOOT. Counsel inform court that 1st amended motion for bill of particular need not be heard at this time

Jan. 23 38) Filed order that defts. motion to disclose informants be *DENIED*.because the defts, have not shown that the disclosure of the identity of the inf. would serve a necessary purpose. It is ordered that defts. motion for inspection reproduction and copying of records and papers used in connection with the jury selection

process be *GRANTED*. It is ordered that defts. motion to dismiss or to suppress be *DENIED* It is ordered that the defts. motion to sever be *GRANTED*. It is ordered that if there is any further grand jury proceeding pertaining to this case the testimony should be reported, transcribed and given to defense counsel. It is ordered that the defts motion to strike is *DENIED*.

Jan. 23 Filed motion for continuance

Jan. 28 Filed motion for rehearing or reconsideration

Jan. 28 Filed defts. motion for enlargement of time to file pretrial motions

Feb. 2 Record of order setting hearing for 9:30 Feb. 5, 1976 on defts motionst for release and motions to vacate the order. severing trial of these defts. from of deft. Dennis Banks. Record of order granting defts motion to extend time file additional motions to 2/11/76. Record of order that ll defts within 1 district be present in court when any other deft in this case is present in

Feb. 5 Record of order granting Mr. Jones Motion to admit Mass. Attorney Lewis Gur___ for the purpose of this action on behalf of deft. Loud Hawk. Record of the deft. KaMook Banks motion for pretrial release. Ordered deft. be released of conditions of release plan approved by this court and deft. agree that the officer may make any additional rules for implementation of this plan so long as the rules are not inconsistent with the plan. Record of hearing deft. Loud Redner motion to reconsider the courts rulings under advisement in part. to set hearing prior to trial re destruction of evidence. Deft. directed to plant regarding informants in defense camp. Record of order that deft. Kansas banks has until 2/20/76 to file pretrial motions. Record of order that de

Loud Hawk and Redner submit another pre release plan.

Feb. 9 Filed order that (1) Counsel be provided at gov. expense copies of documents and materials from the official court records in Armsbury case (2) Counsel be provided copies of all samples reports and other documents which the clerk has submitted to the administrative office of the US Court regarding district of oregon jury selection plan since 1969. (3) Counsel will be permitted to inspect questionaires forms etc. (4) Counsel will be permitted to inspect and collect data from the slips drawn in open court since 1969 which have contained the names of jurors summoned for grand or petitioner jury. (5) Counsel be permitted to match the names of jurors to which reference is made in par. 3 for purposes of collecting data (6) Use of inference is made in par. 3 for purposes of collecting data (6) Use of info is limited neither counsel for deft. or for the gov. may use the inf. obtained in this order to harass, embarrass, or for the invasion of provacy of any person. The inf. should not be used by either party to acquire any further ind. concerning the lives etc. of the person. No public disclosure of the jurors names will be made.

Feb. 9 Filed defts mem, re third party release

Feb. 9 Filed order that defts. and each of them are released to the custody of Alan G. Deal, minister First Unitarian Church Portland, Oregon and such other individuals as he may direct according to said release agreement It is further ordered that defts shall report daily at or before the hour of 1:00 PM to said custodial person and that any failure to do so report shall adhere to the following conditions (1) shall personally appear at all hearing before this court. 92) Shall reside at 3534 S.W. Hood

St. Portland, Oregon and shall not leave the met. areas (3) Defts. shall obey all laws 2/9/76 ntfd. BE s 2/9/76

Feb. 9 Filed order show cause

Feb. 10 Filed Order that the order to show cause filed 2/9/76 and set for hearing 2/1076 is taken off the calendar until further notice of the court 2/9/76 BE s 2/10/76

Feb. 11 Filed return of order to show cause exec. 2/9/76

Feb. 12 Filed order specifying methods and conditions of release on deft. Redner

Feb. 12 Filed order specifying methods and conditions of release on deft. Loud Hawk

Feb. 11 Filed deft. motion for additional peremptories

Feb. 12 Filed order to show cause m 2/12/76 BE 2/12/76

Feb. 12 Filed deft. motion for change in voir dire procedure

Feb. 12 Filed motion for native American Judge

Feb. 13 Filed affidavit of Eldon Olson

Feb. 13 Filed affidavit of William P. Zeller

Feb. 17 Record of order striking hearing on order to show cause set for 2/18/76 BE

Feb. 19 Filed deft. motion to preduce defense camp informants

Feb. 19 Filed deft. motion to preduce informants and for a pretrial hearing

Feb. 18 Record of conference: Ordered defts. oral smotion for continuance of trial granted and case continued from march 8th to May 12, 1976 deft. directed to file formal motion for continuance. At the request of the paties, order hearing on evidentiary motions set for march 22, 1976 at 9:30 AM BE

Feb. 20 Filed gov. designation of high risk

Feb. 23 Filed deft. motion for continuance

Feb. 23 Filed motion for permission to travel as to deft. REDNER

Feb. 25 Record of hearing deft. Ka Mooks motion for modif. of pretrial release plan for travel to ca-

lif. from 2/25/76 to 3/2/76. Ordered motion granted

Feb. 25 Filed motion to amend pretrial release plan m 2/25/76 BE s 2/25/76

Feb. 26 Record of hearing deft. Loud Hawk and Redner motion to modify conditions of to allow them to l to te state of Wash. on 3/1/76. Ordered motion granted

Feb 26 Filed order allowing travel for deft. REDNER m 2/25/76 BE s 2/26/76

Feb. 26 Filed order allowing travel for deft. Loud Hawk m 2/25/76 BE s 2/26/76

Mar. 2 Filed motion for permission for deft. and Loud Hawk to travel

Mar. 2 Filed motion and affidavit in support of motion for deft. to travel

Mar. 4 Record of hearing on defts. motion to travel Order allowing deft. to maint daily contact with ms. Lea. and provide address to Mr. Hawk. (3/4/–3/8/)

Mar. 11 Filed gov. response to defts. motion for additional peremptory challenges

Mar. 11 Filed gov. response to defts. motion for change in voir dire

Mar. 15 Filed gov. answer to defts. motion for search and disclosure of electronic or other surveillance

Mar. 19 Filed Govt's Response to defts Redner, Loud Hawk and KaMook Banks' Motion to produce informants and for a pretrial hearing

Mar. 17 Record of pre hearing conference. ordered portion of defts. motion to suppr evidence set for hearing at 9AM March 19, 1976 BE

Mar. 18 Filed gov. mem re destruction of dynamite

Mar. 19 Record of hearing defts. motion to suppress dynamite Evidence adduced. order hearing continued to March 22, 1976 at (9:30 AM) BE

Mar. 22 Filed testimony of James M. Key

Mar. 17 Filed gov. motion for trial in Pendleton, Oregon

Mar. 22 Filed list of exhibits and witnesses

Mar. 22 Record of hearing defts. Ka Mook Banks motion to join in the other defts motion order motion granted. Record of further hearing defts. motion to suppress ___Evidence adduced. ordered any briefs be submitted not later than March 24, unless either side requests oral arguement. Said request shall be made not later than March 25, 1976. Record of hearingts. motion for discovery Evidence Record of hearing defts. motion to suppress (general) Defts. directed to submit an amended motion within a resonable period of time. Record of hearing deft to disclose informants A § B Court to examine FBI agent Little in camera. US to disclose informants A § B Court to examine FBI agent Little in camera. U/A Record of hearing gov motion for trial in Pendleton, Oregon Ordered motion DENIED. Record of order setting arr. and plea for deft. Dennis Banks on April 13, 1976 at (AM. Record of hearing defts. motion for native American Judge U/A

Mar. 24 Filed response to gov. mem. re destruction of dynamite

Mar. 24 Filed transcript of Motions dated 3/22/76

Mar. 26 Filed motion for permission to travel

Mar. 26 Filed order that deft. Banks, Redner, and Loud Hawk be allowed to travel to Calif. from April 1, 1976 to April 12, 1976 on the condition that deft. main contact with attorneys m 3/29/76 BE s 3/26/76

Mar. 31 Filed order Granting Defts. motion to suppress

Mar. 31 Filed order (re; all motions heard on 3/22/76) see order for details.

Mar. 26 Filed supple. affidavit in support of defts. motion to disclosure elect. surv.

Mar. 26 Filed suppl. affidav. in supp. of defts. motion to prod. defense camp inf.

Mar. 29	Filed motion to amend travel order
April 5	Filed amended order for permission to travel m 4/6/76 BE s 4/2/76
(Nov. 26, 1975)	Record of FINDING that defts are indigent and can proceed in forma pauperis
1976	
April 13	Filed defts. motion for order to aid in challenge of grand and petit jury
Apr. 19	Filed Notice of Appeal by USA from the Order dated 3/30/76, filed 3/31/76 suppressing all evidence relating to dynamite
Apr. 20	Served a copy of the Notice of Appeal on all attorneys for appes and pon the court reporter
Apr. 20	Notified counsel of Rule 20 (Expedited Appeal)
Apr. 20	Mailed a certified copy of the Notice of Appeal, docket entries, and CJA Form 20 (VO s278292) to Court of Appeals
Apr. 13	Record of order appt. counsel for defts as follows. for defts Loud Hawk, Ron Schiffman, For defts. Redner, Sheila Lea and for deft. James Banks, Dennis Stenzel BE
Apr. 15	Filed letter indicating that the pretrial hearing set for 4/29/76 is continued to May 3, 1976 at 9:30 AM BE
Apr. 19	Filed order allowing travel to defts. REDNER to travel to (123) District of Calif. on April 27, 1976 and to return on May 1, 1976 speaking at Humbolt State College m4/20/76 BE s 4/19/76
Apr. 19	124). Filed order allowing travel to deft. REDNER to western District of Wash. on April 27, 1976 and to return April 23, 1976 m 4/20/76 BE s 4/19/76
Apr. 20	Filed motion for continuance on the part of the gov. and mem. Motion is DENIED m 4/20/76 BE s 4/20/76
Apr. 15	Record of in camera exam, of FBI agent Little, Court exam. agent Little under oath BE
Apr. 19	Record of conference. Ordered defts. REDNER oral motion for questionaires to be sent to ran-

	dom sampling of jurors who served from 1968 to 1972 granted. Court shall approve from and number of questionaires which are to be sent. ordered list of names and addresses of prospective jury panel be made available to counsel for defts. Counsel for gov. informs court it does not want a copy of this list. Ordered direct or indirect contact of prospective jurors, their neighbors, friends etc. is prohibited by either side, BE
Apr. 21	Filed gov. answer to defts. motion
Apr. 21	Filed gov. response to defts. banks motion for disc. etc.
Apr. 22	Filed and sealed transcript of in camera interview of Robert H. Little copy of envelope placed in file. Sealed env. placed in vault valuable exhibit drawer, Marshs box BE
Apr. 22	filed deft. motion to dismiss or in the alternative for an in camera pretrial hearing
Apr. 23	Filed motion to suppress personal papers and docu. of all defts. seized purs. to search warrant
Apr. 23	Filed supple. exhibit to defts. motion to dismiss or in the alt. for an in camera pretrial hearing.
Apr. 23	Filed motion to quash or dismiss the ind.
Apr. 23	Filed motion to require that the trial of this cause be held in a facility suff. large to acc. a number of members of the general public
Apr. 26	Record of conference. gov. informs court that it will not be ready for trial on May 12, 1976. Ordered no further hearings be held until decision on the court of appeals on gov. motion for appeal Ordered motion of KaMook Banks for leave to travel to S. Dakota from 4/26/76 to 5/2/76 granted BE
Apr. 30	Filed gov. answer todefts motion to have the trial held in a facility with an enloarged [*sic*] seating capacity
May 3	Filed gov. designation of record

May 4	Filed gov. renewed motion for continuance or in the alternative for a hearing on defts. motions to suppress and dismiss
May 4	File CJA 21 form appt. james Key
May 4	Filed gov. answer to defts motion to dismiss the ind. for alleged governmental misconudct.
May 12	Filed gov. answer to defts. motion for order to aid in challenge of grand and petit jury composition
May 12	Filed gov. answer to defts second motion to dismiss for gross gov. misconduct
May 12	Filed gov. supple. mem. in support of its renewed motion for continuance of the May 12, 1976 trial date
May 12	Record of time set for trial. Case called and gov. informs court it is not ready for trial Defts answer ready. Gov. renews its motions for handwriting exemplars from defts Dennis Bbanks and all other evid. motions. red dftsmotion to dismis the ind. with prejudice prus. to rule 48 (b) granted. and case dismised as to the defts. ordered bonds of these defts exon. Gov. moves to cont. defts. on OR pending its appeal Ruling made DENIED. Ordered gov. motion to continue subp. for gov. witnesses taken under advos. BE
May 14	Filed defts. motion and mem for court re dismissal with prejudice
May 14	Filed defts. opposition to gov. motion to extend life of subp.
May 17	Filed transcript of motion had on Dec 29, 1975
May 17	Filed transcript of motion had on Jan 23, 1976
May 17	Filed transcript of motion had on Feb 5, 1976
May 17	Filed transcript of hearing had on Apr 26, 1976
May 17	Filed transcript of Motion To dismiss had on May 17, 1976
May 17	Mailed RECORD ON APPEAL as follows:

1.3 certified copies of Clerk's Record (pleadings) pgs 1 thru 915 in 4 Volumes—VOLS. I, II, III & IV

2. Orig + two copies of Transcript of Motion had on on 12/23/75—VOL. V of Record On Appeal Orig + two copies of Transcript of Motion had on 12/29/75—VOL. VI of Record On Appeal Orig + two copies of Transcript of Motion had on 1/23/76—VOL. VII of Record On Appeal orig + two copies of Transcript of Motions had on 2/5/76—VOL. VIII of Record On Appeal Orig + two copies of Transcript of Motion To Amend Pretrial Release Plan, had on 2/25/76—VOL. IX Three copies of Transcript of Testimony of James M. Key, had on 3/19/76—VOL. X of Record On Appeal Orig + two copies of Transcript of Motions had on 3/22/76—VOL. XI of Record On Appeal Orig—two copies of Transcript of Hearing had on Apr 26, 1976 = VOL. XII of Record On Appeal Orig + two copies of Transcript of Motion To Dismiss had on May 12, 1976—VOL. XIII of Record On Appeal

May 12	Filed Notice of Appeal by USA from the Order dismissing the Indictment
May 18	Served copies of the Notice of Appeal on counsel
may 18	Mailed a certified copy of the Notice of Appeal, docket entries, and CJA Form 20 to Court of Appeals
May 21	Filed designation of record filed by the gov.
May 19	Filed Govt's Motion for an order continuing all subpoenas issued on behalf of the govt until disposition of the appeal or until further order of the court.
May 28	Mailed Record to Court of Appeals
June 29	Filed Affidavit in support of Extraordinary Attorney's fees.
July 8	Filed Govt's Answer to Defts' Motion to Suppress Personal Papers and Documents of All

defts Seized Pursuanto Search & General Motion to suppress

July 8 Filed Mot to suppl record on appeal (75–296–1)

July 9 Filed Ord suppl record on appeal m 7/21/76-ntfd-s BE 7/9/76

Aug. 3 Filed CJA 21 Form Authorization of Transcript

Aug. 13 Filed CJA 20 Form appointing Sheila Lea

9/22/76 Filed CJA 21 authorizing Joe Hertzberg to provide services

1977

Nov. 7 ORDER from c/a denying defts-appellees' emergency mot for continuance

1978

March 8 R1) ORDER of Remand—rec'd from 9th Circuit Court of Appeals

March 10 R2) Minute Order setting case for call at 9:30 a.m. 3/27/78 for the purpose of setting a hearing date to conduct, an evidentiary hearing based on the Court of Appeals' order of remand. BE

March 27 R3) Rec of call: Ord case cont'd to May 9, 1978, for evidentiary hrg based on Court of Appeals' remand ord. 1½ day. Defts' presence required unless waivers filed. BE

April 11 R4) Discovery Motion

April 18 R6) Gov't answer to deft Redner's Discovery Motion

May 3 R13) See docket entry 75-296-1 (R13) Loud Hawk.

May 8 R14) Gov'ts witness list for 5/9/78.

May 9 R15) Deft Mot excusing him from hrgs, etc., w/affid. ORD 5/9/78 BE

May 9 & 10 R16 thru R18) see Loud Hawk docket 75-296-1.

(8)** R 19) Govt's exhibit list for 5/8/78 hrg.

June 16 R20) ORD extendg time to file proposed findings of fact to & incl 7/14/78. s/e 6/16/78

July 14 R22) CJA auth of Ronald McReary expert witness.

Aug. 1 R23) Govts proposed findgs of fact pursuant to the 3/6/78 Ord of remand.

Aug. 1 R24) Dft's proposed findgs of fact upon remand.

Aug. 23 R26) Findings of fact & conclusions of law. s/e/m 8/23/78BE

Aug. 31 R27) Transcript of Evidentiary hrg of 5/19/78. BE

1980

March 17 R29) MANDATE from C/A reversing and remanding decision of district court with instructions

March 20 R30) ORD from Supreme Court that petition for Writ of Certiorari is Denied

April 2 R31) ORD that case is set for status call on 4/14/80 at 9 a.m.—see dkt on Redner. s BU 4/2/80

April 16 ( ) Rec'd from C/A exhibits & transcripts (see ltr infile)

April 14 R32) Rec of hrg on pending matters—see dkt #1

April 14 R33) List of Motions fld but not decided (fld by Michael Bailey for dfts KaMook and Dennis Banks)

April 14 R34) Waiver of Appearance of Dennis Banks

April 14 R35) Waiver of Appearance of KaMook Banks

April 14 R36) WAIVER Of Appearance of Russ Redner

April 16 R37) Supplemental List of Motions Fld but Not Decided fld by Lynn Parkinson

April 23 R40) ORD that case is assigned to Judge Redden. Schedules fixed by Judge Juba will be ahered to, except as may be changed by Judge Redden. BU 4/23/80

April 24 R41) Dfts mot for Enlargement of Time to File Pre-Trial Motions-fld by atty Parkinson

April 28 R43) Mot for Disclosure of Electronic Surveillance (fld by atty Parkinson for dfts)

April 28 R44) Mot To dismiss Denial of Speedy Trial—(fld by atty Rose for dfts)

April 29 R45) Rec of ord granting dfts' motion for enlargement of time to file pre-trial motions. Pretrial motion to be fld by 5/12/80 (no oppos to Mot #41 has been fld) Redden

April 39 R46) Ord Specifying Methods and cond of Release (dft Redner)

May 12 R50) Dft Redner's Mot For Enlargement of time to file pretrial Motions
R53) Mot To Suppress Evidence (fld by atty Stern for dfts)
R54) Rec of status conf—see dkt #1
R56) CJA 20 aptg Lynn Parkinson for dft Redner

May 28 R65 Rec of status conf: Ord that all briefs be fld by June 9, responses w/in 12 days thereafter. (cnsl to submit stipulated list of motions for determination). Ord setting hrg time 9:30 a.m. 6/23/80 on motions. Redden

June 9 R75 Affidavit of Cnsl—S. Lynn Parkinson for dft Redner

June 18 R81 SUPERSEDING INDICTMENT
26 USC 5861(d) & 5871 and 18 USC 2 Possession of explosive Device; Possession of Explosive Device with no Registration COUNTS 1,2,3,4, 18 USC 922(k), 924(a), & 2 Possesion Firearms with Obliterated Serial Numbers COUNT 5

June 20 R82
thru
R84)SEE DKT 76-296-1

July 7 R92 Mot To Dismiss Cts 3 and 4 for Insufficient Allegations (fld by atty Parkinson)

July 7 R92 Mot To Suppress Evidence of Pretrial Photographic Identification and Tainted Potential Courtroom Identification (fld by atty Parkinson)

July 7 R94 Transcript of Proceedings dated June 23, 1980 before Judge Redden

Aug. 5 R118 Rec of hrg on motions—see dkt on dft #1

Aug. 8 R120 ORD re motions heard 8/5/80—see dkt on dft #1

Aug. 8 R121 ORD that the case of Leonard Peltier is severed from remaining dfts. s RE 8/8/80

Aug. 12 R122 Amended ORD of ord dated 8/8/80 (documt #R120) s/m/e RE 8/12/80

Aug. 12 R123 Rec of ord setting pretrial cond 8/25/80 at 10:30 a.m. before Judge Redden

Aug. 12 R123 Rec of hrg on motions—see dft #1

Aug. 14 R126 Rec of reconsideration of ord denying dfts mot for aptmt of Investiggator at Govt expense. Ord granting dfts mot for appt of Investigator at expense of govt. RE

Aug. 14 R127 Rec of ord that dfts cnsl be furnished a list of prospective jurors w/address of same. RE

Aug. 21 R130 NOTICE OF APPEAL a from deft. from the amended order entered 8-12-80.
(()) No fees pd- appointed counsel.
(()) Mailed copy of notice of appeal to USM, Probation, Parkinson Redner and Youngman.
(()) Mailed copy of notice of appeal, docket, order to court of appeals.

Aug. 25 R134 Designation of Reporter's Transcript (Redner)

Aug. 26 R135 Ex-Parte Mot for Aptmt of Cnsl on appeal and paymt of Transcript Production w/supporting affidavit (Redner)

Aug. 26 R136 Affidavit of Cnsl (Redner)

Aug. 26 R137 Rec of ord striking trial date and staying proceedings as to all dfts-pending appeal.

Aug. 29 R138 Rec of ord denying dfts mot to reconsider mot to produce informants and mot for

disclosure of the identity of all informants. RE

Sept 4 R143 Rec of ord granting mot of dft Russ Redner for aptmt of Lynn Parksinson as cnsl for purposes of appeal. Further ord granting preparation of transcripts at govt expense. RE

Sept. 8 R145 ORD for Time Schedule from C/A (Redner)

Sept. 12 R149 Ord for time Schedule from C/A

Sept. 24 R151 Trans of Proceedings dated 5/12 and 5/28 1980 before Judge Redden

Sept. 24 R152 Trans of Proceedings of testimony of Sidney Rubin dated 6/23/80 before Judge Red

Sept 24 R153 Trans of Hrg on Motions dated 6/24/80 before Judge Redden

Sept. 24 R154 Trans of Hrg on Motions dated 8/5/ and 9/12/80 before Judge Redden

Sept. 25 R155 Supplemental Designation of Transcript

Sept. 26 R156 Transcript of Proceedings dated 11/18/75 before Judge Juba

Sept 26 R157 Transcript of Proceedings dated 11/26/75 before Judge Juba

Sept 26 R158 Transcript of Proceedings dated 12/8/75 before Judge Juba

Sept. 26 R159 Transcript of Proceedings dated 4/14/80 before Judge Juba

Oct. 2 R160 Discovery material provided by the Govt (Volume I and II)

Oct. 6 R161 ORD from C/A that appellants' mot of Sept. 25, 1980 for extension of time to file opening brief is granted

Oct. 15 (()) Appellants designation of clerks received.

Oct. 22 (()) Appellees designation of clerk received.

Oct. 23 (()) Mailed record on appeal to court of appeals.

Oct.**16 162b) CJA 20 appointing S. Lynn Parkinson.

1981

Feb 3 R182) CJA 20 aptg Lynn Parksonson FINAL VOUCHER

1983

Jan 31 R 190 MANDATE from C/A. Appeals are dismissed as to appellants Dennis Banks, Redner, and Loud Hawk for lack of jurisdiction; reversed in part as to appellant Ka-Mook Banks.

R191 ORD from S/C Petition for a writ of certiorari is denied.

Feb 1 R193 ORD setting S.R. Mon., 2/14/83 at 3:00 P.M. before Judge Redden.

Feb 3 R194 ORD striking S.R. of 2/14/83 & RESETTING to Wed., 3/9/83 at 9:00 A.M.

Feb. 18 R195 ORD changing time only to 1:00 p.m. for Stat. Hrg. 3/9/83.

Feb. 25 R196 Rec of ord setting trial date April 11, 1983 commencing at 9:30 a.m. RE

Mar 1 R197 Mot For ORD of Ex Delay. AUSA moves for ORD extending time for trial to commence between wk of May 16, 1983 and Aug 8, 1983,—Afdt attached

Mar. 9 R198 Rec of Ord setting following Sched: March 24, 1983 8:30 a.m. Status conf regarding discovery, hrg on dfts mot for aptmt of expert to assist in jury selection, and hrg on other jury motions pending, hrg on dfts mot for search & disclosure of electronic or other surveillance.

Ord—dfts to file any new motions by March 21, govt response due March 28. Hrg April 6, 1983 9:30 a.m. arraignmt of dfts on this date unless cnls file the necessary motions 30 days prior to this date. (Hrg on dfts mot in limine and 3rd mot to dismiss for govt misconduct)

ORD—trial of this case shall commence on May 3, 1983 at 9:30 a.m. (jury 10 day strike trial date of 4/11)

ORD denying Mr. Schiffman's oral mot to be relieved as cnsl for Loud hawk

March 10 R199)Rec of in camera submission of documents relating to dfts mot to determine electronic surveillance. Govts response submitted. Sealed documents submitted to Crt for in camera inspect.

March 10 R200)Notice of In Camera Submittsion

March 10 R201)Govts Response to DFts Second Mot for Disclosure of Electronic Surveillance

March 14 R202)Letter from Judge Redden to Kenneth Stern re Ex parte Motions for Investigative Services and Travel Expenses

march 15 R203)See docket on Loudhawk

March 17 R204)See docket on Loudhawk

March 17 R205)Govts Mot for Discovery

March 17 R206)Transcript of Proceedings dated March 9, 1983 before Judge Redden

March 18 R207)See dkt on Loudhawk

March 18 R208)See dkt on Loudhawk

March 21 R209)Opinion and Order that the contents of the sealed exhibit shall not be disclosed. s/RE 3/21/83

R210)Mot to dismiss for abuse of Grand Jury process (filed by Parkinson on behalf of all dfts).

R211)Motion for order requiring discovery (filed by Parkinson on behalf of all dfts).

R212)Motion to dismiss for continued litigation is overly burdensome on the court and all parties (filed by Parkinson on behalf of all dfts).

R213)Discovery motion/Brady material (filed by Parkinson on behalf of all dfts).

R214)Ex Parte Motion for appointment of expert to assist defense in conduct of voir dire (REdner and Dennis Banks).

R215)Exhibit in Support of Dfts' (various) jury selection motions and for appointment of

expert (filed by Steenson on behalf of all dfts).

R216)See dkt on Loudhawk

March 22 R217)See dkt on Loudhawk

R218)Rec of conf. w/counsel: Court rptr present only for reporting presence of counsel. ORD striking hrgs scheduled 3/24/83 and 4/6/83.

March 23 R219)Rec of ORD: all responses and hearings on motions are deferred until further order of the court.

March 31 R220)See dkt on Loudhawk

R221)See dkt on Loudhawk

R222)See dkt on Loudhawk

April 11 R223)Rec of ORD: striking trial date May 3, 1983 and setting trial date of May 23, 1983. All motions to be filed by April 20, 1983. Mot hrg set May 9, 1983 at 2:00 p.m.

April 19 R224)Rec of ORD: setting conf. w/counsel Wed. 4/20/83 at 1:30 P.M.

April 20 R225)Rec of status conf: ORD all motions together w/ supporting memorandum be fld by 4/22 together w/list of motio s to be argued. ORD PTC 4/27 at 1:30 (re Banks dfts) ORD govt resp to motions due 4/27. ORAL ARg 4/29 at 1:30. ORD EVID HRG 5/6 at 1:30 (re jury motions)

ORD PTC May 16, 1:30. and May 23, 1983 at 1:30 p.m. *TRIAL DATE JUNE 13, 1983 9:00* (7–10 days jury)

Apr 22 R227)Supplemental Exhibits in Support of Mot for Trial in Absentia

Apr 22 R228)Memo of Law in Support of dfts' Mot to Dismiss for Abuse of Grand Jury Process (filed by atty Parkinson for all dfts).

Apr 22 R229)Memo of Law/Speedy Trial (filed by atty Rose for all dfts)

Apr 22 R230)Mot to Reconsider or Renw Dfts' Motions for Discovery of Defense Camp Informants (filed by atty Parkinson for Redner)Apr. 25R231)Not to Strike or in the alternative to Compel Election (filed by atty Schiffman for all dfts)

Apr. 27 R232)Vots Ans—see Loudhawk dkt

Apr. 27 R233)Govts Ans—see Louddhawk dkt

Apr. 27 R234)Govts Ans—see Loudhawk dkt

Apr. 27 R235)Govts Ans—see Loudhawk dkt

Apr. 27 R236)Govts Ans—see Loudhawk dkt

Apr. 27 R237)Govts Ans—see Loudhawk dkt

Apr. 27 R238)Rec of conference: Rec of exparty hrg mot for aptmt of expert to conduct independent poll re: voir dire of prospective jurors. Ord taking U/A RE

Apr. 28 R239)Govts Ans to Dfts Mot To Dismiss for Delay of Trial

Apr 29 R240)Rec of Mot Hrg. Hrg held on mot for further exculpatory matters, mot re defense camp informant and mot for dismissal. Ord ruling deferred; affidavits from counsel to be submitted as soon as possible. If further argument is needed, it will be sched.

ORD granting mot for appt of expert to assist in poll in part, limited to amt of $7500 and subject to approval of Judge Browning.

ORD setting argument on Mot to Dismiss (Loudhawk) for 5/6/83 (tentatively).

Apr. 29 R241)Affidavit of counsel in Support of Mot to Dismiss (Pretrial delay) (filed by Schiffman).

Apr. 29 R242)Affidavit (filed by Rose).

May 2 R243)ORD granting dft's mot for appt of expert to assist in poll, except that the total authorization is limited to $7,500. S/RE 5/2/83

R244)Mot to Strike Cts I–IV Insufficiency of Indictmt (fld by atty Schiffman)

May 6 R245)Rec of mot hrg: Dfts' Rule 16 smot for discovery—denied. Dfts' mot to dismiss (Grand Jury Misconduct)—denied.

Dfts' mot to dismiss (Burdensome)—denied.

Dfts' mot to Strike/Elect counts—U/A.

Dfts' mot for additional preempt. challenges— granted.

Gvt's mot for reciprocal discovery—granted.

Dfts' mot to change voir dire procedure—U/A.

Rule 16 mot for discovery—Govt submitted documents—except for witness statements. Affidavit of Mr. Parkinson submitted for in camera inspection, dfts Banks joined in affidavit. RE

May 9 R246)Affidavit of Counsel for Dft Redner in support of Mot to Dismiss (Pretrial Delay).

May 9 R247)Affidavit submitted for in camera inspection. Affidavit of L. Parkinson in support of Mot to Dismiss (Pretrial Delay) (sealed per RE 5/9/83

May 12 R248)ORD allowing aptmt of expert— Northwest Attitudes and Social Research, Inc.—see Loudhawk

May 12 R249)Govts Ans to Dfts' Mot to Strike Cts 1–4 for Failure to State a Crime

May 16 R250)see dkt on Loudhawk

May 16 R251)CJA 20 authorizing payment to Parkinson.

May 16 R252)see dkt on Loudhawk

May 19 R253)ORD that govt is auth. to w/draw from Clerk all exhibits entered into evid. by govt during the various pretrial hrgs for preparation for trial and to be used during trial. s/RE 5/19/83

May 19 R254)see dkt on Loudhawk

May 20 R255)(Dft's) Mot for Discovery

May 20 R256)(Dfts') Memo in Support of Mot for Disco ery.

May 20 R257)(Dfts') Ex Parte Mot for Authorization of transcript Duplication Expenses under 18 USC § 3006 (A)(e). SO ORD RE 5/20/83

May 9 R258) Rec of ORD: Ord that dfts' mot for Further Exculpatory Matter is denied based on the govt's assurance that it has produced all exculpatory materials.

Dfts' Mot to Dismiss for Failure to State a Crime-Denied

DFts' Mot in Limine—Denied

Dfts' Mot for Change in Voir Dire—Denied as Moot.

Dft D. Banks' Mot for Trial in Absentia—Denied as Moot

May 20 R259)OPINION that indictment is dismissed with prejudice as to all dfts. s/RE 5/20/83 m/e 5/20/83

May 20 R260)ORD that dfts' Mot to Dismiss is Granted. The indictment is dismissed w/prejudice as to all dfts. s/RE m/e 5/20/83

May 27 R261)(Govt's) Mot continuing each of the subpoenas previously served on its prospective witnesses pending resolution of any appellate proceedings or until further ord of ct. SO ORD RE 5/27/83

May 27 R262)(Govt's) Mot for ord auth it to depose each of its prospective witnesses in order to preserve their testimony for use at trial pursuant to Rule 51(a), Fed.R. Cr P. SO ORD RE 5/27/83

June 2 R263)See dkt on Loudhawk

June 2 R263)See dkt on Loudhawk

June 2 R264)(Govt's) Mot for an order directing the court rptr to transcribe proceedings of March 10, 1983, April 8, 1983, April 20,

1983, April 27, 1983, April 29, 1983, May 6, 1983 and May 16, 1983.

June 3 R265)Rec of Ord: setting aside orders entered May 27 (R261 and R262) (see minute entry).RE

Order setting Status Conf and mot hrg (re document #R263, R264, R261, R262) before Judge Redden 6/24/83 at 9:30 am

June 7 R266)Rec of Ord: dfts' responses to pending motions shall be filed by 6/17/83. RE

June 10 R267)Rec of Ord: striking hrg scheduled June 24, 1983 and resetting to June 30, 1983 at 12:00 noon.

Dfts allowed until 6/28/83 to file responses to motions. RE

June 13 R268)Govt's Objection to the Continuance in the 6/24/83 Hrg.

June 14 R269)Govt's Memo in Support of Post Dismissal Motions.

June 17 R270)NOTICE OF APPEAL by govt from Order dated May 20, 1983 dismissing Incitmt. no fees paid

June 17 R271)Ord for time Schedule

June 17 (()) Mld copy of the N/A to dft, USM, defense cnsl, & AUSA

June 17 (()) Mld copy of the N/A, dkt and ord to C/A

June 17 R272)Rec of ORD: that govt's request to strike the 6/30/83 hrg and reset it to 6/24/83 is DENIED. RE

June 20 R272)CJA Frm 20 authorizing payment to Parkinson (for dft Redner)

June 23 R274)Response to Govts Motions to Depose and To Continue Subpoenas (fld by Ronald Schiffman, atty for LoudHawk)

June 24 R275)Rec of ord: rescheduling hrg from 12:00 noon to 11:00 a.m. 6/30/83. RE

June 28 R276)see dkt on Loudhawk

June 29 R277)Transcript of Proceedings—see Loudhawk dkt

June 30	R278)Rec of hrg govts motions to Depose Witnesses, Continue SUbs, Transcribe in Chambers Proceedings, and or ord to file Govts Response to Proposed Plea Procedure re Dennis J. Banks Ord taking U/A. RE
June 30	R279)Letter from Charles Turner, US Attny
March 21 (out of order)	R216a)Mot To Dismiss For Delay of Trial (fld by atty Stern)
July 1	R280)(Govt's) Transcript Designation and Ordering Form
July 5	R281)ORDER declining to rule on govts motions fld after the appeal. s RE 7/5/83
July 5	R282)Letter from Kenneth Stern
July 6	R283)Transcript of Proceedings dated June 30, 1983 before Judge Redden
July 11	R284)Transcript of Proceedings dated march 3, 1976 before Judge Juba
July 19	R285)Transcript Designation and Ordering Form
July 28	R286)Transcript of Grand Jury Testimony of Clayton Kramer, Steven L. Hancock, David Milam and James Karolides of 6/17/80.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 75-296-4

UNITED STATES OF AMERICA, PLAINTIFF

v.

DENNIS JAMES BANKS, DEFENDANT

RELEVANT DOCKET ENTRIES

1975	
Nov. 25	( ) Filed Indictment
Nov. 25	9) Issued warrant for arrest of deft (4100,000 cash or corp. surety requested)
Dec. 22	FILED SUPERSEDING INDICTMENT
Dec. 22	Issued warrant for arrest of deft. (100,000.00 cash or corp. surety)
Dec. 29	Filed return of warrant of arrest of deft. dated 11/25/75 superseded by warrant and indictment dated 12/22/75
1976	
Jan 30	Filed return of warrant for arrest of deft. exec. 1/26/76 in Calif.
Feb. 18	Record of conference: Ordered deft. oral motion for continuance granted and case continued from March 8, to May 12, 1976 defts. directed to submitt formal motion for continuance. At the request of the parties, ordered hearing on evidentiary motions set for March 22, 1976 at 9:30 AM BE
Feb. 20	Filed gov. designated high risk
Feb. 23	Filed deft. motion for continuance
Feb. 23	Filed deft. REDNER motion for permission to travel
March 21	Filed testimony of James M. Key
March 17	Filed gov. motion for trial in pendleton, Oregon
March 22	Filed list of witnesses and exhibits

March 22 Record of hearing defts. KaMooks Banks motion to join in the other defts. motions ordered motion granted. Record of further hearing defts. motion to suppress. evidence. Evidence adduced. ordered any briefs be submitted not later than march 24, 1976 under adv. unless side requests oral arguments Said request shall be made not later than march 25, 1976. Record of hearing defts. motion for discovery Evidence adduced. Record of hearing deft. general motion to suppress Deft. directed to submit an amended motion within a reasonable period of time. Record of hearing defts. motion to disclose informants A § B Court to examine FBI agent Little in Camera U/A/ Record of hearing gov. motion for trial in pendleton, Oregon Ordered motion denied. Record of order setting arr. and plea for deft. Dennis Banks on April 13, 1976 at 9 AM. Record of hearing deft., motion for native American Judge U/A/ BE

March 24 Filed transcript of motions dated 3/22/76

April 7 Received papers from U.S. Magistratres Office in C lif, Re; Defts. appearance here in Portland, Oregon on 4/13/76 before Judge Belloni

April 8 97) Filed notice of motion and motion for discovery inspection and copying. Bill of particulars

April 8 98) Filed motion for discovery and inspection and copying

April 8 99) Filed mem. of points and authorities in support of motion for discovery, inspection and copying

April 8100) Filed motion for bill of particulars

April 8 101) Filed mem. of points and authorities in support of motion for bill of particulars

April 8 102) Filed motion for discovery and evidence favorable to the deft.

April 8 103) Filed mem. of points and authorities in support of motion to produce evidence favorable to the deft.

April 8 104) Filed points and authorities in support of defts motion to disclose the identity of all informants and for an evidentiary hearing

April 8 105) Filed notice of motion and motion for disclosure of the identity of all informants and for an evid, hearing

April 8 106) Filed notice of motion and motion supple. to defts. motion for discovery, inspection and copying

April 8 107) Filed motion supple. to defts. motion for discovery, inspection and copying

April 8 108) Filed mem. of points and authorities in support of motion supple defts motion for discovery, inspection and copying

April 8 109) Filed notice of motion and motion for disclosure of Grand Jury Testi,

April 8 110) Filed mem. of points and authorities re disclosure of grandjury transcript

April 12 111) Filed defts. notice of motion and motion for disclosure of electronic or other surveillance & Affidavit of Dennis Roberts and Karen Spelke in support

April 12 112) filed order that the U.S. Attorneys office shall have to and including April 21, 1976 within which to respond to the pretrial motions filed by Dennis James Banks in the above case m 4/11/76 BE s 4/12/76

April 13 113) Record of Arraignment and pleas of Not guilty entered as to each of the 5 cts. of the ind. Deft gives true name as charged. ordered trial set May 12, 1976. Ordered hearing on all motions set April 29, 1976 at 9:30 AM. Ordered an 7 requested voire dire questions be submitted before April 29th. Ordered deft. may continue on present bail BE

April 13 114) Filed appearance bond received from Calif. Receipted in the $2,000.00

April 13 Filed defts. motion for order to aid in challenge of Grand and petiti jury composition

April 19 115) Filed Notice of Appeal by USA from the Order dated 3/30/76, filed 3/31/76 suppressing all evidence relating to dynamite

April 20 Served a copy of the Notice of Appeal on all attorneys for appellees and upon the court reporter

April 20 Notified counsel of Rule 20 (Expedited Appeal)

April 20 Mailed a certified copy of the Notice of Appeal, docket entries, and CJA Form 20 (VO#27892) to Court of Appeals

April 13 Record of order appt. counsel for defts as follows. for defts. Loud Hawk, Ron Schiffman, or defts. Redner, Sheila Lea, and for defts. Dennis Banks Dennis Stanzel

April 15 Filed letter indicating that the pretrial hearing set for April 29, 1976 has been rescheduled for May 3, 1976 at 9:30 AM BE

April 20 Filed gov. motion for continuance, DENIED m 4/20/76 BE s 4?20?76

April 15 Record of in camera exam of FBI agent Little. Court exam agent Little under oath. BE

April 21 Filed gov. answer to defts. motions

April 21 Filed gov. answer to defts. banks motions etc.

April 22 Filed notice of appearance of counsel

Aapril 22 Record of filing and sealing transp. in camera interview of Robert Little Copy of env. placed in file. Sealed enc. placed in vault valuable exh. drawer BE

April 22 Filed defts. motion to dismiss or in the alternative for an in camera pretrial hearing

April 23 Filed motion to suppress personal papers and doc. of all defts. seized pursuant to search warrant

April 23 Filed motion to dismiss cts. I, 2 and 3 for negligence suppression of evidence relevant to the

charged and nes. to the preparation of a defense

April 23 Filed motion to dismiss ind. for gross gov. misconduct

April 23 Filed suppl exhibit to defts motion to dismiss or in the alternative for an in camera pretrial hearing

April 23 Filed motion to quash or dismiss the ind. etc.

April 23 Filed motion to require that the trial of this case be held in a fac. suff. larger to hold members of the general public

April 26 Record of conference. Gov. informs court that it will not be ready for trial on May 12, 1976. Ordered no further hearings he held until decision of the court of appeals of gov. appeal. Ordered motion of KaMooks Banks for leave travel to S. DAKOTA from 4/26/76 to 5/2/76 is granted Be

April 30 Filed gov. answer to defts motion to agve the trial held in a facility with an enlarged seating capacity

April 30 134) Filed second motion to dismiss for gross gov. misconduct

April 30 135 Filed gov. motion to compel handwriting exempars

April 30 136) Filed gov. answer to the motion fo deft. Banks to dismiss Ct I, II, III Of the ind.

May 3 Filed gov. designation of record

May 4 Filed gov. renewed motion for continuance or in the alternative for hearing defts motions to suppress and dismiss

May 3 Filed CJA 21 form appt. james Key

May 4 Filed gov. answer to defts. motion to dismiss the ind. for alleged governmental misconduct

May 12 Filed gov. answer to defts. motion for order to aid in challenge of grand and petit jury composition

May 11 Filed gov. answer to defts second motion to dismiss for gross gov. misconduct

May 11	Filed gov. suppl. mem in support of its renewed motion for a continuance of the May 12, 1976 trial date.
May 12	Record of time set for trial. Case called in and gov. informs the court it is not ready for trial. Defts. answer ready. Gov. renews its motions for handwriting exemplars from defts. Dennis Banks and all other eved. motions. ordered defts motion to dismiss the ind. with prejudice prus. to rule 48(b) granted. and case dismissed as to these defts. ordered bonds of these defts. exonerated. Gov. moves to continue defts. on OR pending its appeal. Ruling made and DENIED. Ordered gov. motion to continue subp. for gov. witnesses U/A BE
May 14	Filed defts. mem for court re dismissal with prejudice
May 14	Filed defts. opposition to gov. motion to extend life of the subp.
May 17	Filed Transcript of Hearing had on Apr 26, 1876
May 17	Filed Transcript of Motion To Dismiss had May 12, 1976
May 17	Mailed the following RECORD ON APPEAL: A. Three certified copies of Clerk's Record (pleadings)—pgs 1 thru 915 in Four volumes, VOLS. I, II, III & IV B. Orig + two copies of Transcript of Motion had on 12/23/75—VOL. V Orig ± two copies of Transcript of Motion had on 12/29/75—Vol. VI Orig + two copies of Transcript of Motion had on 1/23/76—VOL. VII Orig + two copies of Transcript of Motions had on 2/5/76—VOL. VIII Orig + two copies of Transcript of Motion To Amend Pretrial Release Plan, had on 2/25/76—VOL. IX Three copies of Transcript of Testimony of James M. Key, had on 3/19/76—VOL. X Orig + two copies of Transcript of Motions had on 3/22/76—VOL. XI

	Orig + two copies of Transcript of Hearing had on 4/26/76—VOL. XII Orig + two copies of Transcript of Motion To Dismiss had on 5/12/76—VOL. XIII
May 12	Filed Notice of Appeal by USA from the Order Dismissing the Indictment
May 18	Served a copy of the Notice of Appeal on all counsel
May 18	Mailed a certified copy of the 91) Notice of Appeal (2) docket entries, (3) and CJA Form 20 to Court of Appeals
May 21	Filed gov. designation of record
May 21	Filed order eonerating bond m 5/24/76 BE s 5/21/76
*May 19	Filed Govt's motion for an order continuing all subpoenas issued on behalf of the govt until disposition of the appeal or until further order of the c
May 20	Mailed Record to Court of Appeals
July 8	Filed Govt's Answer to Defts' Motion to Suppess Personal papers and Documents of All defts Seized pursuant ot search & General Motion to Suppress
July 8	Filed Mot suppl record on appeal
July 8	Filed Ord suppl record on appeal m 7/21/76-ntfd-s BE 7/9/76
Aug. 3	Filed CJA 21 Form Aughorization of Transcript
Nov. 10	Filed CJA 20 appointing Dennis Stenzel 1525 N.E. Weidler St. Portland, Oregon 288-5561
1978	
March 8	R1) ORDER of remand—rec'd from 9th Circuit Court of Appeals
march 10	R2) Minute Order setting case for call at 9:30 a.m. 3/27/78 for the purpose of setting a hearing date to conduct an evidentiary hearing based on the Court of Appeals' order of remand. BE
March 27	R3) Rec of call: Ord case cont'd to MAY 9, 1978 for evidentiary hrg based on C/A remand ord.

1½ days. Defts; presence required unless waivers filed. BE

April 12 R5) Waiver of Appearance by deft Banks for evidentiary hearing

May 3 R13) see docket entry R13 on 75-296-1 (LoudHawk)

May 8 R14) Govt's witness list ofr 5/9/78.

May 9&10 R16 thru R 18) see Loud Hawk docket 75-296-1.

May (8) **R19) Govt's exhibit list for 5/9/78 hrg.

June 16 R20) ORD extending time to file proposed findgs of fact to & incl 7/14/78. s/e 6/16/78 BE

August 1 R23) Govt's proposed findgs of fact pursuant to the 3/6/78 ORD or remand.

August 1 R24) Dft's proposed findgs of fact upon remand.

August 23 R26) Findings of fact & conclusions of law. s/e/m 8/23/78 BE

August 31 R27) Transcript of evidentiary hrg. of 5/9/78. BE

1980

March 17 R29) MANDATE from C/A reversing and remanding decision of district court with instructions

March 20 R30) ORD from Supreme Court that petition for Writ of Certiorari is denied

April 2 R31) ORD that case is set for status call on 4/14/80 at 9 a.m.—see dkt on Redner. s BU 4/2/80

April 16 (()) Rec'd from C/A exhibits & transcripts (see ltr in file)

April 14 R32) Rec of hrg all pending matters—see dkt #1

April 14 R33) List of Motions fld but not decided—fld by Michael Bailey for dfts kaMook and Dennis Banks

April 14 R34) Waiver of Appearance of Dennis Banks

April 14 R35) Waiver of Personal Appearance by KaMook Banks

April 14 R36) Waiver of Apperance by Russ Redner

April 16 R37) Supplemental List of Motions Fld but Not Decided (fld by Lynn parkinson)

April 24 R38) Notice of Appearance of Cns. kenneth Stern appears as local cnsl for Dennis Banks

April 24 R39) Second Supplemental List of Motions Filed But Not Decided (filed by kenneth Stern—atty for Dennis Banks)

April 23 R40) ORD case assigned to Judge Redden s BU 4/23/80

April 24 R41) Dfts Mot for Enlargement of Time to File Pre-Trial Motions (fld by L. parkinson0

April 24 R41) Dfts Mo for Enlargemt of time to File Pre-Trial Motions (fld by L. parkinson)

April 28 R43) Mot For Disclosure of Electronic Surveillance (fld by atty parkinson for dfts)

April 28 R44) Mot to Dismiss Denial of Speedy Trial (fld by atty Rose for dfts)

April 29 R45) Rec of ord granting dfts mot for enlargemt of time to file pre-trial motions. Pretrial motions to be filed by 5/12/80. (no oppos to Mot #41 has been fld) Redden

May 12 R51) Dfts Mot For enlargemt of time to File Pre-Trial Motions (D Banks)

May 12 R52) Supplemental Affidavit of Kenneth Stern in Support of Mot for Disclosure of Electronic or Other Surveillance

May 12 R53) Mot to Suppress Evidence (fld by atty Stern for dfts)

May 12 R54) Rec of status conf: see dkt #1

May 28 R61) Waiver of appearance of dfts Dennis Banks and Darlene Nichols

may 28 R63) ord Specifying Methods and Cond of Release (Dennis Banks)

may 28 R65) Rec of status conf: Ord all briefs be fld by June 9, responses to be fld w/in 12 days thereafter (consl to submit stipulated list of motions for determination). Ord setting hrg time 9:30 a.m. 6/23/80 on motions. Redden

May 28 R66) Dennis Banks—Mot To dismiss For Bad Faith prosecution

May 28 R67) Dennis Banks—Mot to Dismiss, Grand Jury Composition

May 28 R68) Dennis Banks—Mot For Change IN Jury procedure

June 9 R79) Mot To Amend Mot to Dismiss For Bad Faith Prosecution—fld by atty Stern for dfts and dft Banks)

June 18 R81) SUPERSEDING INDICTMENT
26 USC 5861 (d) & 5871 and 18 USC 2 Possession of explosive Device; Possession of Explosive Device with No Registration COUNTS 1,2,3,4
18 USC 922 (K), 924(A), & 2 Possession of Firearms with obliterated serial numbers COUNT 5
18 USC 1202(a) Possession of Firearms with Obliterated Serial Numbers COUNT 6

June0 R82–R84) See dkt 75CR296-1

June 24 R85) Affid of Kenneth S. Stern in suppt of mot to reconsider Disclosure of Defense Camp Informants and mot for discovery & Inspection. (C to RE).

July 75 R95) Mot For Change in Jury Selection Procedure (D. Banks)

July 7 R96) Mot To Dismiss: Grand Jury Composition (D. Banks)

July 7 R97) Mot To Dismiss For Vindictive Prosecution (D. Banks)

July 21 R102) Mot For Disclosure and production (D. Banks)

July 21 R103) Mot For Aptmt of Investigator at Govt Expense (D. Banks)

July 21 R104) Affidavits in Support of Mot For Aptmt of Investigator at Govt Expense: Mot For Disclosure and Production, and; Third Mot To Dismiss For Gross Governmental Misconduct

July 21 R105) Third Mot to Dismiss For Gross Governmental Misconduct

July 28 R114) Mot to Quash Indictmt or, In the Alternative, TO Strike

August 5 R118) Rec of hrg on motions—see dkt on dft #1

August 8 R120) Rec of ORD re motions heard 8/5/80—see dkt on dft #1

August 8 R121) ORD that case of leonard Peltier is severed from remaining dfts. s RE 8/8/80

August 12 R122) Amended ord of order dated 8/8/80 (documt #R120) s/m/e 8/12/80 Redden

August 12 R123) Rec of ord setting ptc for 8/25/80 at 10:30 a.m. RE

August 12 R124) Rec of hrg on motions—see dft #1

August 15 R125) NOTICE OF APPEAL from deft (Banks) from the amended order entered 8/12/80.

August 15 (()) no fees pd. cja appointment-retained.

August 18 (()) Mailed copy of notice of appeal to Stern, Roberts, Banks, Youngman, Turner, USM.

August 18 (()) Mailed copy of notice of appeal, cja form, docket to court of appeals.

August 14 R126) Rec of reconsideration of ord denying dfts mot for aptmt of Investigator at Govt Expense. ord Granting dfts mot for aptmt of Investigator at expense of govt. RE

August 14 R127) Rec of ord that dfts cnsl be furnished a list of prospective jurors w/ address of same. RE

August 15 R128) Ex parte Mot for Stay of Proceedings until such time as C/A decides issued in Appeal of ORD denying dfts Mot to Dismiss for Vindictive Prosecution. (D. Banks)

August 15 R129) Rec of ord granting dft Dennis Banks' ex parte mot for stay of proceedings. RE

August 21 R131) Designation of Reporters Transcripts—Dennis Banks

August 21 R132) CJA 20 aptg kenneth Stern for Dennis Banks—Interim Voucher #1

August 26 R137) Rec of ord striking trial date and staying proceedings as to all dfts-pending appeal. RE

August 29 R138) Rec of ord denying dfts' mot to reconsider mot to produce informants and mot for disclosure of the identity of all informants. RE

Sept. 8 R146) ord for Time Schedule for C/A (Dennis Banks)

Sept. 10 E147) Ex Parte Mot for Aptmt of Cnsl on Appeal and Paymt of Transcript production (Dennis Banks)

Sept. 10 R148) Rec of ord Granting dft Dennis Banks' mot for aptmt of cnsl on appeal and payment of transcript production at govt expense. RE

Sept. 12 R149) Ord from Time Schedule from C/A

Sept. 24 R151) Transcript—see dkt on Loudhawk

Sept 24 R152) Transcript—see dkt on Loudhawk

Sept. 24 R153) Transcript—see dkt on Loudhawk

Sept. 24 R154) Transcript—see dkt on Loudhawk

Sept. 25 R155) Supplemental Designation of Transcript

Sept. 26 R156) Transcript of Proceedings dated 11/18/75 before Judge Juba

Sept. 26 R157) Transcript of proceedings dated 11/26/75 before Judge Juba

Sept. 26 R158) Transcript of Proceedings dated 12/8/75 before Judge Juba

Sept. 26 R159) Transcript of proceedings dated 4/14/80 before Judge Juba

Oct. 2 R160) Discovery Material provided by the Govt (Volume I and II)

Oct. 6 R161) Ord from C/A that appeallants' mot of Sept. 25, 1980 for extension of time to file opening brief is granted.

Oct. 15 (()) Appellants designation of clerks received.

Oct. 22 (()) Appellees designation of clerks record received.

Oct. 23 (()) Mailed record on appeal to court of appeals.

Oct. **16 162c) CJA 20 appointing Kenneth S. Stern.

Nov 17 R166) ORDER mot of KaMook Banks to augment the record is granted. Banks will file

supplemental designation of record—material will be filed w/this court not later than 12/29/80 C/A

Nov. 12 R176) CJA 21 authorizing services of Ace Investigations

1981

Feb. 3 R183) CJA 20 aptg Kenneth Stern FINAL VOUCHER

1983

Jan 31 R190) MANDATE from C/A. Appeals are dismissed as to appellants Dennis Banks, Redner and Loud Hawk for lack of jurisdiction; reversed in part as to appellant Ka-Mook Banks.

R191) ORDER from S/C. Petition for a writ of certiorari is denied.

Feb. 1 R193) ORD setting S.R. Mon., 2/14/83 at 3:00 P.M. bbefore Judge Redden.

Feb. 3 R194) ORD striking S.R. of 2/14/83 & RESETTING to Wed., 3/9/83 at 9:00 a.m. before Judge Redden.

Feb. 18 R195) ORD changing time only to 1:00 P.M. for Stat Hrg 3/9/83.

March 9 R198) Rec of Ord setting sched.—see docket on Loud hawk

March 10 R199) Rec of in camera submission of documents relating to dfts' mot to determine electronic surveillance. Govt's response submitted. Sealed documents submitted to Crt for in camera inspect. RE

March 10 R200) Notice of In Camera Submission

March 10 R201) Govts Response to DFts' Second Mot for Disclosure of Electronic Surveillance.

March 14 R202) Letter from Judge Redden to Kenneth Stern re Ex Parte Motions for investigative Services and Travel Expenses

March 15 R203) See dkt on Loudhawk

March 17 R204) See dkt on Loudhawk

March 17 R205) Govts mot for Discovery

March 17 R206) Trans of Proceedings dated 3/9/83 before Judge Redden

March 18 R207) See dkt on Loudhawk

March 18 R208) See dkt on Loudhawk

March 21 R209) OPINION and ORD that contents of the sealed exhibit shall not be disclosed. S/RE 3/21/83

R210) Mot to dismiss for abuse of Grand Jury Process (filed by Parksinson on behalf of all dfts).

R211) Motions for order requiring discovery (filed by Parkinson on behalf of all dfts).

R212) Motion to dismiss for continued litigation is overly burdensome on the court and all parties (filed by Parkinson on behalf of all dfts).

R213) Discovery motion/Brady material (filed by Parkinson on behalf of all dfts).

R214) Ex Parte motion for appointment of expert to assist defense in conduct of voir dire (Redner and Dennis Banks).

R215) Exhibit in support of dfts' (various) jury selection motions and for appointment of expert (filed by Steenson on behalf of all dfts).

R216) Motion for trial in absentia or in the alternative, motion for trial with dft's electronic presence (Dennis Banks).

March 22 R217) Ex Parte ORD: travel expenses for counsel under the CJA not to exceed $600. are hereby ordered. No excludable delay has occurred in connection w/this matter. s/RE 3/22/83. (Dennis Banks)

R218) Rec of conf: court rptr present only for reporting presence of counsel. ORD striking hrgs scheduled 3/244/88 and 4/6/83.

March 23 R219) Rec of ORD: all responses and hearings on motions are deferred until further order of the court.

March 31 R220) Waiver of Appearance of Kamook and Dennis Banks.

R221) See dkt on Loudhawk

R222) Waiver of 30-day time limit between arraignment and trial. (Dennis Banks)

April 11 R223) Rec of ORD: striking trial date May 3, 1983 and setting trial date of May 23, 1983. All motions to be filed by April 20, 1983. Mot hrg set May 9, 1983 at 2:00 p.m.

April 19 R224) Rec of ORD: setting conf. w/counsel Wed. 4/20/83 at 1:30 P.M.

April 20 R225) Rec of statuus conf—see Loudhawk dkt. *TRIAL DATE SET JUNE 13, 1983* 9:00 (7–10 days jury)

April 22 R226) Govts Ans to Dfts Mot for Discovery

April 22 R227) Supplemental Exhibits in Support of MOt for Trial in Absentia (fld by atty Stern for Dennis Banks)

April 22 R228) Memo of Law in Support of dfts' Mot to Dismiss for Abuse of Grand Jury Process (filed by dft Parkinson for all dfts).

April 22 R229) Memo of Law/Speedy Trial (filed by atty Rose for all dfts)

April 22 R230) see dkt on Loudhawk

April 25 R231) Mot to Strike or in the alternative to Compel Election (filed by atty Schiffman for all dfts)

April 27 R232) Govts Ans—see Loudhawk Dkt

April 27 R233) Govts Ans—see Loudhawk Dkt

April 27 R234) Govts Ans—see Loudhawk Dkt

April 27 R235) Govts Ans—see Loudhawk Dkt

April 27 R236) Govts Ans—see Loudhawk Dkt

April 27 R237) Govts Ans—see Loudhawk Dkt

April 27 R238) Rec of Conf: Rec of exparty hrg mot for aptmt of expert to conduct independent poll re: voir dire of prospective jurors. Ord taking U/A. RE

April 28 R239) Govts Ans to Dfts Mot to Dismiss for Delay of Trial

April 29 R240) Rec of mot hrg. Hrg held on mot for further exculpatory matters, mot re defense camp informant and mot for dismissal. ORD ruling deferred; affidavits from counsel to be submitted as soon as possible. If further argument is needed, it will be sched. 5/6/83.
ORD granting mot for appt of expert to assist in poll in part, limited to amt of $7500 and subject to approval of Judge Browning.
ORD setting argument on Mot to Dismiss (Loudhawk) for 5/6/83 (tentatively).

April 29 R241) Affidavit of counsel is Support of Mot to Dismiss (Pretrial delay) (filed by Schiffman).

April 29 R242) Affidavit (filed by Rose).

May 2 R243) ORD sgranting dfts' mot for appt of expert to assist in poll, except that the total authorization is limited to $7,500. S/RE 5/2/83

May 4 May 4R244) Mot to Strike Cts I-IV Insufficiency of Indictmt

May 6 R245) Rec of mot hrg. Dfts' Rule 16 mot for discovery—denied.
Dfts' mot to dismiss (Grand Jury Misconduct)—denied.
Dfts' mot to dismiss (Burdensome)—denied.
Dfts' mot to Strike/Elect counts—U/A.
Dfts' mot for additional preempt. challenges—granted.
Gvt's mot for reciprocal discovery—granted.
Dfts' mot to change voir dire procedure—U/A.
Rule 16 mot for discovery—Govt submitted documents—except for witness statements. Affidavit of Mr. Parkinson submitted for in camera inspection, dfts Banks joined in affidavit. Re

May 9 R246) Affidavit of Counsel for Dft Redner in support of Mot to Dismiss (Pretrial Delay).

May 9 R247) Affidavit submitted for in camera inspection. Affidavit of L. Parkinson in support of Mot to Dismiss (pretrial delay) (sealed per RE 5/9/83).

May 12 R248) ORD allowing aptmt of expert— Northwest Attitudes and Social Research, Inc., etc.—see Loudhawk

May 12 R249) Govts Ans to Dfts Mot to Strike Cts 1–4 for Failure to State a Crime

May 16 R250) CJA Authorizing payment to Stern. (Banks)

May 16 R251) see dkt on Loudhawk

May 16 R252) see dkt on Loudhawk

May 19 R253) ORD that govt is authorized to w/draw from Clerk all exhibits entered into evidence by govt during the various pretrial hrgs for preparation for trial and to be used during trial. s/RE 5/19/83

May 19 R254) ORD that govt is authorized to offer into evidence and to otherwise use any transcripts of proceedings before Grand Jury which returned the 6/18/83 Superseding Indct during any proceedings involving proposed pleas of guilty by dfts D. Banks and KaMook Banks. s/RE 5/19/83

May 20 R255) (Dfts') Mot for Discovery.

May 20 R256) (Dfts') Memo is Support of Mot for Discovery.

May 20 R257) (Dfts') ExParte Mot for Authorization of Transcript Duplication Expenses under 18 USC 3006(A)(e). SO ORD RE 5/20/83

May 20 R258) Rec of ORD: ORD that dfts' mot for Further Exculpatory matter is denied based on the govts assurance that it has produced all exculpatory materials.
Dfts' Mot to Dismiss for Failure to State a Crime-Dened
Dfts' Mot in Limine—Denied
Dfts' Mot for Change in Voir Dire—Denied as Moot
Dft D. Banks' Mot for trial in Absentia—Denied as moot

May 20 R259) OPINION that indictment is dismissed with prejudice as to all dfts. s/RE 5/20/83 m/e 5/20/83

May 20 R260) ORD that dfts' Mot to Dismiss is Granted. The indictment is dismissed w/prejudice as to all dfts. s/RE m/e5/20/83

May 27 R261) (Govt's) Mot continuing each of the subpoenas previously served on its prospective witnesses pending resolution of any appellate proceedings or until further ord of ct. SO ORD RE 5/27/83

May 27 R262) (govt's) Mot for ord auth it to depose each of its prospective witnesses in order to preserve their testimony for use at trial pursuant to Rule 51(a), Fed. R. Cr. P. SO ORD RE 5/27/83

June 2 R263) (Govt's) Mot for an order directing Clerk to file the orig of Govt's response to the proposed plea procedure by dft Dennis Banks.

June 2 R264) (Govt's) Mot for an order directing the court rptr to transcribe proceedings of march 10, 1983, April 8, 1983, April 20, 1983, April 27, 1983, April 29, 1983, May 6, 1983 and May 16, 1983.

June 3 R265) Rec of Ord: setting aside orders entered May 27 (R261 and R262) (see minute order). RE

Order setting Status Conf. and mot hrg (re document #R263, R264,% 261 and R262) before Judge Redden 6/24/83 at 9:30 a.m.

June 7 R266) Rec of ORD: dfts' responses to pending motions shall be filed by 6/17/83. RE

June 10 R267) Rec of Ord: striking hrg scheduled June 24, 1983 and resetting to June 30, 1983 at 12:00 noon

June 10 Dfts allowed until 6/28/83 to file responses to motions. RE

June 13 R268) Govt' Objection to the Continuance in the 6/24/83 Hrg.

June 14 R269) Govt's Memo in Support of Post Dismissal Motions.

June 17 R270) NOTICE OF APPEAL by govt from ORD dated May 20, 1983 dismissing Indictmt. no fees paid

June 17 R271) Order for Time Schedule

June 17 (()) Mld copy of N/A to dft, USM, defense cnsl & AUSA

June 17 (()) Mld copy of N/A, dkt and ord to C/A

June 17 R272) Rec of ORD: that the govt's request to strike the 6/30/83 hrg and reset it to 6/24/83 is DENIED. RE

June 20 R273) See dkt on Loudhawk.

June 23 R274) Response to Govts Motions to Depose and To Continue Subpoenas (fld by atty Schiffman for dft Loud Hawk)

June 24 R275) Rec of Ord: rescheduling hrg from 12:00 noon to 11:00 a.m. 6/30/83. RE

June 28 R276) Response to Govt's Post-Dismissal Motions (filed on behalf of Dennis Banks, KaMook Banks, and Loudhawk).

June 29 R277) Transcript of Proceedings—see Loudhawk dkt

June 30 R278) Rec of hrg govts motions—see Loudhawk dkt. Ord taking U/A REDDEN

June 30 R279) Letter from Charles Turner, US Atty

March 21 (out of order) R216a) Mot To dismiss For Delay of Trial—fld by atty Stern

July 1 R280) (Gov'ts) Transcript Designation and Ordering Form.

July 5 R281) ORD declining to rule on govts motion filed after appeal. s RE 7/5/83

July 5 R282) Letter from Kenneth Stern re AUSA request to transcribe confidential proceedings.

July 6 R283) Transcript of Proceedings dated June 30, 1983 before Judge Redden

July 11 R284) Transcript of Proceedings dated march 3, 1976 before Judge Juba.

July 19 R285) Transcript Designation and Ordering Form

July 28 R286) Transcript of Grand Jury Testimony of Clayton Kramer, Steven L. Hancock, David Milam and James Karolides of 6/17/80.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 75-296-5

UNITED STATES OF AMERICA, PLAINTIFF

v.

DARLENE PEARL NICHOLS, true name KA MOOK BANKS, DEFENDANT

RELEVANT DOCKET ENTRIES

11-18-75 First appearance:
Deft. admitted identity and was advised of rights.
Deft. waived removal hearing.
Filed Waiver of Removal Hearing.
Filed and Entered Order for Warrant of Removal.
CLOSED—to Clerk.

Nov. 25 1) Filed Indictment

Nov. 25 10) Issued warrant for arrest of deft ($100,000 cash or corp. surety requested)

Dec. 22 11) Filed defts. motion for pretrial release

Dec. 22 FILED SUPERSEDING INDICTMENT

Dec. 22 Issued warrant of arrest of deft. (100,000.00 cash or corp. surety)

Dec. 22 Record of order setting arr and plea for 12/29/75 RCB

Dec. 23 Record of hearing deft. Darlene Pearl Nichols motion for reduction for bail. Ordered motion granted and bail reducted to $20,000.00 cash or corp. surety. on following conditions: Deft. required to submit medical reports from a qualified and licensed physicians on a weekly basis to the court. deft. imform court and her attorney of any travel or address change. Deft. surrender herself to nearest U.S. Marshal as soon as she is able to travel but not

later than 1/19/76 noon. Deft. allowed to post bail in the district of Kansas RCB

Dec. 23 12) Filed order see above entry #11. 12/22/75 RCB 12/23/75

1976

Jan 12 Filed return of warrant for rest of deft. exec 12/8/75 by arresting the within named deft. and having her before the Magistrates in Kansas

Feb 2 Filed Motion for Pretrial Release

Feb 2 Filed Affidavit of Counsel in Support of Motion for Pretrial Release

Feb. 2 Filed papers received from the district of Wichita Kansas

Feb. 2 Filed CJA 20 papers appt. Michael Bailey

Feb. 2 Record of order appt. Michael T. Bailey as attorney for deft. Ordered deft. submit affidavit of forma pauperis status. Deft. gives her true name as KaMook Banks. Deft. arr. and pleas of NG entered. as to cts 1,2,3, and 4. Ordered case set for trial wk of 3/8/76 Record of hearing defts motion for pretrial release. Sworn witnesses. Ordered deft. submit plan to court. BE

Feb. 5 Filed order specifing methods and conditions of release RCB

Feb. 5 Record of order granting Mr. Jones motion to admit Mass. Attor Lewis Gurwitz for the purpose of this action on behalf of deft. Loud Hawk. Record of hearing deft. kaMook Banks motion for pretrial release. Ordered deft. be released on the conditions of release plan approved by this court and deft. agree that the probation officer may make any additional rules for implementation of this plan so long as the rules are not inconsistent with the plan. RECORD OF HEARING DEFTS. L Hawk and redners motion to reconsider the courts rulings U/D. in part. Court to set hearing

prior to trial re destruction of evidence. Defts directed to submit plant regarding informants in defense camp. Record of order that deft KaMook Banks has until 2/20/76 to file pretrial motions. Record of order that defts. Houd Hawk and Redner submit another pre trial release plan BE

sFeb. 13 Filed affidavit of Deft. Kamook Banks aka Darlene Nichols

Feb. 17 Filed joinder of motions

Feb.19 Filed deft. motion to produce defense camp informants

Feb. 20 Filed deft. motion to produce informants and for a pretrial hearing

Feb 18 Record of conference: Ordered deft. oral motion for continuance of trial granted and case continued from March 8, 1976 to May 12, 1976 Deft. directed to submit formal motion for continuance. At the request of the parties ordered hearing on evid. metions st. for March 22, 1976 at 9:30 AM BE

Feb. 20 Filed gov. designation of high risk

Feb. 23 Filed deft. motion for continuance

Feb. 23 Filed motion for permission to travel as to deft. REDNER

Feb. 25 Record of hearing deft. KaMooks Banks motion for modi. of pretrial release plan for trabel to calif. from 2/25/76 to 3/2/76 Order motion granted BE

Feb. 25 Filed motion to amend pretrial release plea for KaMook Banks m 2/25/76 BE s2/25/76

Feb. 26 Record of hearing deft. Loud Hawk and Redner motion for modification of release to allow them to travel to the state of Wash. on March 1, 1976

Ordered motion granted BE

Feb. 26 Filed order allowing travel for deft. Redner m 2/25776 BE s 2/26/76

Feb. 26 Filed order allowing travel for deft. Loud Hawk m 2/25/76 BE s 2/26/76

March 11 Filed defts. motion for transcript of previous proceedings

March 11 Filed Gov. response to defts. motion for additional peremptory challenges

March 11 Filed gov. response to defts. motion for change in Voir dire

March 15 filed gov. answer to defts. motion for search and disclosure of electronic or other surveillance

March 15 Filed motion for issuance of subp. at public expense with attached order

March 15 Filed order allowing defts. motion for issuance of subp. at public exp. m 3/12/76 J s 3/15/76

March 19 Filed govt's Response to Defts' Redner, Loud Hawk and KaMook Banks' Motion to produce informants and for a pretrial hearing

March 17 Record of pre hearing conference. Ordered portion of defts. motion to suppress evidence set for hearing at 9AM March 19, 1976 BE

March 18 Filed gov. mem re destruction of dynamite

March 19 Record of hearing defts. motion to suppres dynamite. Evidence adduced. ordered hearing continued to March 22, 1976 at ((9:30) AM BE

March 19 Filed affidavit of deft. in support of defts. motion to disclose defense camp informants and to produce informants A and B

Filed testimony of James M. Key

March 17 Filed gov. motion for trial in Pendleton, Oregon

March 22 Filed list of exhibits and witnesses

March 22 Record of hearing defts. KaMook Banks motion to join in the other defts. motions. Order granting. Record of further hearing deft. motion to suppress evidence. Evidence adduced. ordered aby briefs be submitted not later the march 24, 1976. Under advisement unless either side requests oral argum Siad request shall be made not later than march 25, 1976. Record of hearing defts. motion general motion to suppress. Defts. directed to submit an amended motion within a reasonable period of time. Record of hearing defts. motion to disclose informants A&B Court to examine agent Little in camera. U/A. Record of hearing gov. motion for trial in Pendleton, Oregon OrderDENIED. Record of order setting arr. and plea for deft. dennis banks April 13, 1976 at 9AM. Record of hearing defts. motion for native American Judge U/A BE

March 24 Filed response to gov. mem. re destruction of dynamite

March 24 Filed transcript of motions dated 3/22/76

March 26 Filed motion for permission to travel

March 26 Filed order that deft. Loud Haw, Redner and Banks be allowed to travel to a Calif. on April 1, 1976 to April 12, 1976 deft. to maintain daily contact m 3/29/76 BE s 3/26/76

March 31 Filed order granting defts. motion to suppress all evidence re dynamite

March 31 Filed order (re: motions heard on 3/22/76) see order for details

March 26 Filed supp.t affidavit in support of defts. motion to disc. electronic sur

March 26 Filed supple. affidavit in support of defts. motion to produce def. camp i

March 20 Filed motion to amend travel order

April 5 Filed amended order for permnission to travel m 4/6/76 BE s 4/2/76

April 13 Filed defts. motion for order to aid in challenge of grand and petit jury

April 19 Filed Notice of Appeal by USA from the Order dated 3/30/76, filed 3/31/76 suppressing all evidence relating to dynamite

April 20 Served a copy of the Notice of Appeal on all attorneys for appellees and upon the court reporter

April 20 Notified counsel of Rule 20 (Expedited Appeal)

April 20 Mailed a certified copy of the Notice of Appeal, docket entries, and CJA FORM 20 (VO.#278292) to Court of Appeals

April 15 Filed letter indicating that pretrial hearing set for April 29, 1976 to May at 9:30 AM BE

April 20 Filed motion for continuance DENIED m 4/20/76 BE s 4/20/76

April 15 Record of in camera exam, of FBI agent Little. Court exam agent Little under

April 20 Filed order allowing travel for Defts. Loud Hwk. and KaMook Banks to travel Seattle, Wash. on April 21, 1976 to April 23, 1976 attend at the Un. of Wash. a speaking engagement

April 21 Filed gov. answer to defts. motions

April 21 Filed gov. answer to defts. banks motions etc.

April 22 Filed notice of app. of counsel for BANKS

April 22 record of filing and sealing transc. in camera int. of Robert Little. Copy env. placed in file. Sealed env. placed in vault Valuable exh. drawer BE

April 22 Filed s. motionto dismiss or in the alternative for an in camera pretrial hearing

April 23 Filed motion to suppress personal papers and documents of all defts. Seize prs. to seach warrant

April 23 Filed suppl exhibits to defts motion to dismiss or in the alternative for camera pretrial hearing

April 23 Filed motion to quash ind. or to dismiss etc.

April 23 Filed motion to require that the trial be held in a facility suff. large to the general public

April 26 Filed motion to amend third party release plan traveling from April 26, 1976 to May 2, 1976 BE s 4/26/76 M 4/28/76

April 26 Record of conference. Gov. informs court this it will not be ready for tria May 12, 1976. Ordered no further hearings be held until decision of the of appearls on Gov. appeal. Ordered motion of KaMook Banks for leave

travel to south Dakcta from 4/26/76 to 5/2/76 granted BE

May 3 Filed gov. designation of record

May 3 Filed gov. renewed motion for cont. or in the alternative for hearing on df motion to suppress and dismiss

May 4 Filed CJA 21 form Appt. James Key

May 4 Filed gov. answer to defts motion to dismiss for alleged gov. misconduct.

May 12 Filed gov. answer to defts. motion for order to aid in challenge of grand and petit jury composition

May 11 Filed gov. answer to defts second motion to dismiss for gross gov. misconduct

May 11 Filed gov. suppl. mem in support of its renewed motion for a continuance of the May 12, 1976 trial date.

May 12 Record of time set for trial. Case called and gov. informs the court it is not ready for trial. Defts. answer ready. Gov. renews its motions for handwriting exemplars from defts. Dennis Banks and all other eved. motions. Ordered defts. motion to dismiss the ind. with prejudice prus. to rule 48 (b) granted. and case dismissed as to these defts. Ordered bonds of these defts. exonerated. Gov. moves to continue defts. on OR pending its appeal. Ruling made and DENIED. Ordered gov. motion to continue subp. for gov. witnesses U/A BE

May 14 Filed defts. mem for court re dismissal with prejudice

May 14 Filed defts. opposition to gov. motion to extend life of the subp.

May 17 Filed transcript of motion, had on 12/23/75

May 17 Filed transcript of Motions had on Feb 5, 1976

May 17 Filed transcript of Motion To Amend Pretrial Release Plan, had on Feb 25, 1976

May 17 Filed transcript of Hearing, had on Apr 26, 1976

May 17	Filed transcript of Motion To Dismiss, had on 5/12/76
May 17	Mailed the following RECORD ON APPEAL to Court of Appeals: A. 3 certified copies of Clerk's Record (pleadings) pgs 1 thru 915 in Four Volumes, VOLS. I, II, III & IV B. orig + 2 copies of Transcript of Motion had on 12/23/75—VOL. V of Record On Appeal Orig + 2 copies of Transcript of Motion had on 12/29/75—VOL. VI of Record On Appeal Orig + 2 copies of Transcript of Motion had on 1/23/76—VOL. VII of Record On Appeal Orig + two copies of Transcript of Motions had on 2/5/76—VOL. VIII of Record On Appeal Orig + two copies of Transcript of Motion To Amend Pretrial Release Plan, had on 2/25/76—VOL. IX 3 COPIES OF Transcript of Testimony of James M. Key, had on 3/19/76—VOL. X of Record On Appeal Orig + 2 copies of Transcript of Motions had on 3/22/76—VOL. XI of Record On Appeal Orig + 2 copies of Transcript of Hearing had on 4/26/76—VOL. XII of Record On Appeal Orig + 2 copies of Transcript of Motion To Dismiss had on 5/12/76—VOL. XIII of Record On Appeal
May 12	Filed Notice of Appeal by USA from the Order Dismissing the Indictment
May 18	Serviced a copy of the Notice of Appeal on all counsel
May 18	Mailed a certified copy of the Notice of Appeal, docket entries. and CJA Form 20 to Court of Appeals
May 21	FILED GOV. designation of record
May 19	Filed govt's motion for an order continuing all subpoenas issued on behalf of the govt until disposition of the appeal or until further order of the court
May 28	Mailed Record to Court of Appeals

July 8	Filed govt's Answer to Defts' Motion to suppress Personal papers and Document of all defts seized pursuant to search and General Motionto suppress
Aug. 3	Filed CJA 21 Form—Authorization of Transcript
Oct. 15	Filed Return of Warrant for Arrest of Deft. deft. arrested jan. 7, 1976.
1977	
Nov. 7	ORDER from c/a denying defts-appellees' emergency mot for continuance
1978	
March 8	R1) ORDER of remand—rec'd from 9th Circuit Court of Appeals
March 10	R2) Minute Order setting case for call at 9:30 a.m. 3/27/78 for the purpose of setting a hearing date to conduct an evidentiary hearing based on the Court of Appeals' order of remand. BE
March 27	R3) Rec of call: Ord case cont'd to may 9, 1978, for evidentiary hrg based on C/A remand ord. 1½ days. defts presence required unless waivers filed. BE
Apr 17	R7) Deft-appelle Ka-Mook Banks waiver of appearance at evidentiary hrg 5/9/78 BE
May 3	R13) See docket entry on 75-296-1 (Loud Hawk)
May 8	R14) Govt's witness list for 5/9/78.
May 9&10	R16 thru R18) see Loud Hawk docket 75-296-1.
Apr. (8)**	R19) Govt's exhibit list for 5/9/78 hrg.
June 16	R20) ORD extendg time to file proposed findgs of fact to & incl 7/14/78. s/e 6/16/78 BE
Aug. 1	R23) Govt's proposed findgs of fact pursuant to 3/6/78 Ord. or remand.
Aug. 1	R24)Dft's proposed findgs of fact upon remand.
Aug. 23	R26) Findings of fact & conclusions of law. s/e/m 8/23/78 BE
Aug. 31	R27) Transcript of evidentiary hrg of 5/9/78. BE

Oct. 30 R28) Retn of serv of BW. Retnd from kansas unexecuted.

1980

March 17 R29) MANDATE from C/A reversing and remanding decision of district court with instructions

march 20 R20) Ord from Supreme Court that petition for Writ of Cert is denied

April 2 R31) ORD that case is set for status call before the magistrate on Monday, April 14, 1980 at 9 a.m.—see dkt on Redner s BU 4/2/80

April 16 (())Rec'd from C/A exhibits & transcripts (see ltr in file)

April 14 R32) Rec of hrg all pending matters—see dkt #1

April 14 R33) List of Motions Fld but not Decided (fld by Michael Bailey for KaMook and Dennis Banks)

April 14 R34) Waiver of Appearance of Dennis Banks

April 14 R35) Waiver of Appearance by KaMook Banks

April 14 R36) Waiver of Appearance by Russ Redner

April 16 R37) Supplemental List of Motions fld but not Decided (fld by Lynn Parkinson)

April 23 R40) ORD that case assigned to Judge Redden s BU 4/23/80

April 24 R41) Dfts Mot For Enlargement ot Time to File Pre-Trial Motions (fld by L. Parkinson)

April 28 R43) MOt For Disclosure of electronic Surveillance (fld by atty parkinson for dfts

April 28 R44) Mot To Dismiss Denial of Speedy Trial (fld by atty Rose dfr dfts)

April 29 R45) Rec of ord granting dfts mot for enlargemt of time to file pretrial motions. Pretrial motions to be filed by 5/12/80. (no oppos to Mot #41 has been fld) Redden

May 9 R48) Mot For Aptmt of National Jury Project (fld by atty for Kamook Banks)

May 12 R53) Mot To Suppress Evidence (fld by atty Stern for dfts)

may 12 R54) Rec of status conf—see ddkt #1

May 12 R57) CJA 20 aptg Michael T. Bailey for Kamook Banks

May 28 R61) Waiver of Appearance of dfts Dennis Banks and Darlene Nichols

May 28 R64) ORD Specifying Methods and Cond of Release (Darlene Nichols,)

May 28 R65) Rec of status conf: Ord all briefs be fld by June 9, responses to be fld w/in 12 days thereafter (cnsl to submit stipulated list of motions for determination). Ord setting hrg time 9:30 a.m. 6/23/80 on motions. Redden

June 9 R76) Affidavit of Cnsl In Support of Motions—fld by M. Bailey for dft Ka-Mook Banks

June 18 R81) SUPERSEDING INDICTMENT
26 USC 5861(d) & 5871 and 18 USC 2 Possession of explosive Device; Possession of Explosive Device with No Registration COUNTS 1,2,3,4
18 USC 922(k), 924(a) & 2 Possession of Firearms with Obliterated Serial Numbers COUNT 5
18 USC 922(h),924(a), & 2 Possession of firearms with Obliterated Serial Number COUNT 7

June 20 R82–R84) See dkt 75CR296-1.
July 7R99) Mot To Dismiss For Preindictmt Delay—KaMook Banks

Aug. 5 R118) Rec of hrg of motions—see dkt on dft #1

Aug. 8 R120) ORD re motions heard 8/5/80—see dkt on dft #1
ORD that motion to dismiss is denied except as to dft aMook Banks. (dft KaMook Banks in dismissed) s RE 8/8/80

Aug. 12 R122) AMENDED ORDER—of order dated 8/8/80 (documt #R120) re Motion to Dismiss for Vindictive Prosecution—see ORDER s/m/e 8/12/80 Redden

Aug. 29 R138) Rec of ord denying dfts' mot to reconsider mot to produce informants and mot for disclosure of the identity of all informants. RE

Sept. 2 R139) NOTICE OF APPEAL by govt. from the amended order entered 8/12/80.
(()) No fees pd.—govt. appeal
(()) Mailed copy of notice of appeal to Youngman, Stern, Parkinson, Schiffman, USM, probation & Bailey
(()) Mailed copy of notice of appeal, docket to court of appeals.

Sept. 12 R149) Ord for Time Schedule from C/A

Sept. 17 R150) KaMook Banks—Designation of Transcript

Sept. 24 R151) Transcript—see dkt on Loudhawk

Sept. 24 R152) Transcript—see dkt on Loudhawk

Sept. 24 R153) Transcript—see dkt on Loudhawk

Sept. 24 R154) Transcript—see dkt on Loudhawk

Sept. 25 R155) Supplemental Designation of Transcript

Sept. 26 R156) Transcript of Proceedings dated 11/18/75 before Judge Juba

Sept. 26 R157 Transcript of proceedings see dkt on Loudhawk

Sept. 26 R158) Transcript of Proceedings see dkt on Loudhawk

Sept. 26 R159) Transcript of Proceeding see dkt on Loudhawk

Oct. 6 R161) Ord from C/A that appellants' mot of Sept. 25, 1980 for extension of time to file opening brief if granted.

Oct. 15 (()) Appellants designation of clerks record received.

Oct. 22 (()) Appellees designation of clerks record received.

Oct. 23 (()) Mailed record on appeal to court of appeals.

Oct. **16 162d) CJA 20 appointing Michael T. Bailey

Nov. 3 R164) ORD from C/A: Granting govt mot for extens of time.

Nov. 17 R166) ORD mot of KaMook Banks to augment the record is granted. Banks will file a sup-

plemental designation of record—material will be filed w/this court no later than 12/29/80 C/A

1981
Feb. 3 R184) CJA 20 aptg Ka-Mook Banks FINAL VOUCHER

1983
Jan. 31 R190) MANDATE FROM C/A. Appeals are dismissed as to appellants Dennis Banks, Redner and Loud Hawk for lack of jurisdiction. reversed in part as to appeallant Ka-Mook Banks.

1983
Jan. 31 R192) ORD from S/C. Petition for a writ of certiorari is denied.

Feb. 1 R193) ORD setting SR Mon., 2/14/83 at 3:00 PM before Judge Redden.

Feb. 3 R194) ORD striking SR of 2/14/83 & RESETTING to Wed., 3/9/83 at 9:00 A.M before Judge Redden.

Feb. 18 R195) ORD changing time only to 1:00 P.M. for Stat Hrg 3/9/83.

Feb. 25 R196) Rec of ORD setting trial date APirl 11, 1983 commencing at 9:30 a.m. RE

Mar 1 R197) Mot for ORD of Ex Delay. AUSA moves Court for ORD extending trial to between wk of May 16, 1983 and wk of Aug 8, 1983.—Afdt attached.

Mar. 9 R198) REc of ord setting sched—see docket on Loud Hawk RE

Mar. 10 R199) Rec of in camera submission of documents relating to dfts' mot to determine electronic surveillance. Govt's response submitted. Sealed documents submitted to Crt for in camera inspect. RE

Mar. 10 R200) Notice of In Camera Submission

Mar. 10 R201) Govt's Response to Dfts' Second Mot for Disclosure of Electronic Surveillance.

Mar. 14 R202) Letter from Judge Redden to Kenneth Stern re Ex Parte Motions for Investigative Service and Travel Expenses

Mar. 15 R203) See dkt on Loudhawk

Mar. 17 R204) See dkt on Loudhawk

Mar. 17 R205) Govts Mot For Discovery

Mar. 17 R206) Trans of Proceedings dated 3/9/83 before Judge Redden

Mar. 18 R207) See dkt on Loudhawk

Mar. 18 R208) See dkt on Loudhawk

Mar. 21 R209) OPENION and ORD that contents of the sealed exhibit shall not be disclosed. s/RE 3/21/83

R210) Motion to dismiss for abuse of Grand Jury process (filed by Parkinson on behalf of all dfts).

R211) Motion for order requiring discovery (filed by Parkinson on behalf of all dfts).

R212) Motion to dismiss for continued litigation is overly burdensome on the court and all parties (filed by Parkinson on behalf of all dfts).

R213) Discovery motion/Brady material (filed by Parkinson on behalf of all dfts).

R214) see dkt on Loudhawk

R215) Exhibit in Support of dfts (various) jury selection motions and for appointment of expert (filed by Steenson on behalf of all dfts).

R216) see dkt on Loudhawk.

Mar. 22 R217) see dkt on Lcudhawk

R218) Rec of conf w/counsel: court rptr present only for reporting presence of counsel. ORD striking hearings scheduled 3/24/83 & 4/6/83.

Mar. 23 R219) Rec of ORD: all responses and hearings on motions are deferred until further order of the court.

March 31 R220) Waiver of Appearance of Kakook and Dennis Banks.

R221) Waiver of 30-day time limit between arraignment and trial. (Kamook Banks)

R222) See dkt on Loudhawk.

April 11 R223) Rec of ORD: striking trial date May 3, 1983 and setting trial date of May 23, 1983. All motions to be filed by April 20, 1983. Mot hrg set May 9, 1983 at 2:00 p.m.

April 19 R224) Rec of ORD: setting conf. w/counsel Wed. 4/20/83 at 1:30 P.M.

April 20 R225) Rec of status conf—see Loudhawk dkt. *TRIAL DATE set JUNE 13, 1983 9:00* (7-10 days jury0 RE

April 22 R226) Govts Ans to DFts MOt for Discovery

April 22 R227) Supplemental Exhbits in Support of Mot for Trial in Absentia (fld by atty Stern for Dennis Banks)

April 22 R228) Memo of Law in Support of dfts' Mot to Dismiss for Abuse of Grand Jury Process (filed by atty parkinson for all dfts).

April 22 R229) Memo of Law/Speedy Trial (file by atty Rose for all dfts)

April 22 R230) see dkt on Loudhawk

April 25 R231) Mot to Strike or in the alternative to Compel Election (filed by atty Schiffman for all dfts).

April 27 R232) Govts Ans—see Loudhawk dkt

April 27 R233) Govts Ans—see Loudhawk dkt

April 27 R234) Govts Ans—see Loudhawk dkt

April 27 R235) Govts Ans—see Loudhawk dkt

April 27 R236) Govts Ans—see Loudhawk dkt

April 27 R237) Govts Ans—see Loudhawk dkt

April 27 R238) Rec of conf: Rec of exparty hrg mot for aptmt of expert to conduct independent poll re: voir dire of prospective jurors. Ord taking U/A RE

April 28 R239) Govts Ans to Dfts' Mot to Dismiss for Delay of Trial

April 29 R240) Rec of mot hrg. Hrg held on mot for further exculpatory matters, mot re defense camp informant and mot for dismissal. Ord ruling deferred; affidavits from counsel to be

submitted as soon as possible. If further argument is needed, it will be sched 5/6/83.

ORD granting mot for appt of expert to assist in poll in part, limited to amt of $750[illegible] and subject to approval of Judge Browning.

ORD setting argument on Mot to Dismiss (Loudhawk) for 5/6/83 (tentatively).

April 29 R241) Affidavit of counsel in Support of Mot to Dismiss (Pretrial delay) (filed by Schiffman)

R242) Affidavit (filed by Rose).

May 2 R243) ORD granting dfts' mot for appt of expert to assist in poll, except that the total authorization is limited to $7,500. S/RE 5/2/83

May 4 R244) Mot to Strike Cts I-IV Insufficiency of Indictmt

May 6 R245) Rec of mot hrg: Dfts' Rule 16 mot for discovery—denied.

Dfts' mot to dismiss (Grand Jury Misconduct)—denied.

Dfts' mot to dismiss (Burdensome)—denied.

Dfts' mot to Strike/Elect counts—U/A.

Dfts' mot for additional preempt. challenges—granted.

Gvt's mot for reciprocal discovery—granted.

Dfts' mot to change voir dire procedure—U/A.

Rule 16 mot for discovery—Govt. submitted documents—except for witness statements. Affidavit of Mr. Parkinson submitted for in camera inspection, dfts Banks joined in affidavit. RE

May 9 R246) Affidavit of Counsel for dft Redner in support of mot to Dismiss (Pretrial Delay).

May 9 R247) Affidavit submitted for in camera inspection. Affidavit of L. Parkinson in support of Mot to Dismiss (pretrial delay) (sealed per RE 5/9/83.)

May 12 R248) ORD for aptmt of expert, Northwest Attitudes and Social Research, etc.—see Loudhawk dkt

May 12 R249) Govts Ans to Dfts Mot to Strike Cts 1-4 for Failure to State a Crime

May 16 R250) see dkt on Loudhawk

May 16 R251) see dkt on Loudhawk

May 16 R252) see dkt on Loudhawk

May 19 R253) ORD that govt is authorized to withdraw from Clerk all exhibits entered into evidence by govt during the various pretrial hrgs for preparation ofr trial and to be used during trial. s/RE 5/19/83

May 19 R254) ORD that govt is auth to offer into evidence and to otherwise use any transcripts of proceedings before Grand Jury which returned the 6/18/83 Superseding Indct. during any proceedings involving proposed pleas of guilty by dfts D. Banks and KaMook Banks. s/RE 5/19/83

May 20 R255) (Dfts') Mot for Discovery

May 20 R256) (Dfts') Memo in Support of Mot for Discovery

R257) (Dfts') Ex Parte Mot for Authorization of Transcript Duplication Depenses under 18 USC 3006(A)(e).

R258) Rec of ORD: ORD that dfts' mot for Further Exculpatory Matter is denied based on the govt's assurance that it has produced all exculpatory materials.

Dfts' Mot to Dismiss for Failure to State a Crime—Denied.

Dfts' Mot in Limine—Denied

Dfts' Mot for Change in Voir Dire—Denied as Moot.

Dft. D. Banks' Mot for Trial in Absentia—Denied as Moot.

May 20 R259) OPINION that indictment is dismissed with prejudice as to all dfts. s/RE 5/20/83 m/e 5/20/83

May 20	R260) ORD that dfts' Mot to Dismiss is Granted. The indictment is dismissed w/prejudice as to all dfts. s/RE m/e5/20/83
May 27	R261) (Govt's) Mot continuing each of the subpoenas previously served on its prospective witnesses pending resolution of any appellate proceedings or until further ord of ct. SO ORD RE 5/27/83
May 27	R262) (Govt's) Mot or Ord auth it to depose each of its prespective witnesses in order to preserve their testimony for use at trial pursuant to Rule 51(a), Fed.R.Cr.P. SO ORD RE 5/27/83
June 2	R263) See dkt on Loudhawk
June 2	R264) (Govt's) Mot for an order directing the court rptr to transcribe the proceedings of March 10, 1983, April 8, 1983, April 20, 1983, April 27, 1983, May 6, 1983 and May 16, 1983.
June 3	R265) Rec of OrdL setting aside orders entered May 27 (R261 and R262) (see minute entry) RE
	Ord setting Status Conf. and mot nrg (re document #R263 R264, R261 and R262) before Judge Redden 6/24/83 at 9:30 a.m.
June 7	R266) Rec of ORD: dfts' responses to pending motions shall be filed by 6/17/83. RE
June 10	R267) Rec of Ord: striking hrg scheduled June 24, 1983 and resetting to June 30, 1983 at 12:00 noon.
	Dfts allowed until 6/28/83 to file responses to motions. RE
June 13	R268) Govt's Objection to the Continuance in the 6/24/83 Hrg.
June 14	R269) Govt's Memo in Support of Post Dismissal Motions.
June 17	R270) NOTICE OF APPEAL by govt of Ord dated may 20, 1983 dismissing Indictmt. no fees paid
June 17	R271) Ord for Time Schedule

June 17	(()) MLD copy of N/A, dkt and ord to C/A
June 17	(()) MLD copy of N/A to dft, USM, defense cnsl & AUSA
June 17	R272) Rec of ORD: that the govt's request to strike the 6/30/83 hrg and reset it to 6/24/83 is DENIED. RE
June 20	R273) see dkt on Loudhawk
June 23	R274) Response to Govts Motions to Depose and to Continue Subpoenas (bld by atty Schiffman, atty for Loud Hawk)
June 24	R275) Rec of Ord; rescheduling hrg from 12:00 noon to 11:00 a.m. 6/30/83. RE
June 28	R276) Response to Govt's Post-Dismissal Motions (filed on behalf of Dennis Banks, KaMook Banks and Loudhawk.
June 29	R277) Transcript of Proceedings—see Loudhawk dkt
June 30	R278) Rec of hrg govts motions—see Loudhawk dkt-ord taking U/A RE
June 30	R279) Letter from Charles Turner, US Atty
March 21	R216a) Mot To dismiss for Delay of Trial (fld by atty Stern) (out of order)
July 1	R280) (Govt's) Transcript Designation and ordering Form
July 5	R281) ORD declining to rule on govts motions filed after the appeal s RE 7/5/83
July 5	R282) Letter from Kenneth Stern RE AUSa request to transcribe confidential proceedings.
July 6	R283) Transcript of proceedings dated June 30, 1983 before Judge Redden.
July 11	R284) Transcript of proceedings dated March 3, 1976 before Judge Juba
July 19	R285) Transcript Designation and Ordering Form
July 28	R286) Transcript of Grand Jury Testimony of Clayton Kramer, Steven L. Hancock, David Milam and James Karolides of 6/17/80.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CR 75-296

UNITED STATES OF AMERICA

v.

KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; AND ANNA MAE AQUASH, ALSO KNOWN AS ANNIE MAY PICTOU AND NAGUSET EASK, DEFENDANTS.

[Filed Nov. 25, 1975]

INDICTMENT
[26 U.S.C. Section 5861(d)
26 U.S.C. Section 5871
26 U.S.C. Section 5861(h)
18 App. U.S.C. Section 1202(a)]

THE GRAND JURY CHARGES:

COUNT I. On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly possessed a destructive device consisting of a combination of parts designed and intended for use in converting a device into a destructive device; said combination of parts consisting of: a) six (6) pocket watches, each with a hole drilled in the face with a metal screw inserted into the hole in a position to make contact with the moving hands of the watch, with a soldered battery connector and a ground wire attached with expended flashbulbs attached; b) four (4) batteries with wires attached; and c) two (2) expended flashbulbs with wires attached; and said device consisting of watches, timing devices, electrical blasting cap leg wires, wires, electrical blasting cap, detonating cord, batteries, and

seven (7) cases of Du Pont 70% dynamite, and said destructive device had not been registered to them in the National Firearms Registration and Transfer Record as required by Section 5841, Title 26, United States Code; in violation of Section 5861(d) and 5871, Title 26, United States Code.

COUNT II. On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly possessed a firearm, that is, a Valmet M 62/S 7.62x39mm, Semi-Automatic Rifle, Interarms, with metal stock, which had its serial number, required by Section 5842, Title 26, United States Code, obliterated, removed, changed and altered in violation of Sections 5861(h) and 5871, Title 26, United States Code.

COUNT III. On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly possessed a firearm, that is, a Valmet M62/S 7.62x39mm, Semi-Automatic Rifle, Interarms, wooden stock, which had its serial number, required by Section 5842, Title 26, United States Code, obliterated, removed, changed and altered in violation of Sections 5861(h) and 5871, Title 26, United States Code.

COUNT IV. On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eaask, defendants herein, wilfully and knowingly possessed a firearm, that is, a Valmet M62/S 7.62x39mm, Semi-Automatic Rifle, Interarms, with wooden stock, which had its serial number, required by Section 5842, Title 26, United States Code, obliterated, removed, changed

and altered in violation of Sections 5861(h) and 5871, Title 26, United States Code.

COUNT V. On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly possessed a firearm, that is, a Valmet M62/S 7.62x39mm, Semi-Automatic Rifle, Interarms, metal stock, which had its serial number, required by Section 5842, Title 26, United States Code, obliterated, removed, changed and altered in violation of Sections 5861(h) and 5871, Title 26, United States Code.

COUNT VI. On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly possessed a firearm, that is, a Colt AR-15 Cal. .223, Model SP1, which had its serial number, required by Section 5842, Title 26, United States Code, obliterated, removed, changed and altered in violation of S ections 5861(h) and 5871, Title 26, United States Code.

COUNT VII. On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly possessed a firearm, that is, a Swiss made, calibre 7.5mm Fed. Ord. Inc. So. El Monte, CA., which had its serial number, required by Section 5842, Title 26, United States Code, obliterated, removed, changed and altered in violation of Sections 5861(h) and 5871, Title 26, United States Code.

COUNT VIII. On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER;

DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly possessed a firearm, that is, a Smith & Wesson .357 Magnum, 4 inch barrel, round butt, which had its serial number, required by Section 5842, Title 26, United States Code, obliterated, removed, changed and altered in violation of Sections 5861(h) and 5871, Title 26, United States Code.

COUNT IX. On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly possessed a firearm, that is, a Smith & Wesson .357 Magnum, Model 19, round butt, 2½ inch barrel, which had its serial number, required by Section 5842, Title 26, United States Code, obliterated, removed, changed and altered in violation of Sections 5861(h) and 5871, Title 26, United States Code.

COUNT X. On or about November 14, 1975, in Malheur County, Oregon, DENNIS JAMES BANKS, defendant herein, a person who had been convicted by the Seventh Judicial Court, Custer, South Dakota, on July 26, 1975 of a felony, to-wit: riot while armed, did wilfully possess firearms, to-wit:

1) Safari De Luxe .30/06 rifle, Serial Number A 983 S with Williams peep sight;

2) 35 Remington, Woodmaster, Model 81, Serial number 31264;

3) Valmet M 62/S 7.62x39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with metal stock;

4) Valmet M62/S 7.62x39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with wooden stock;

5) Valmet M62/S 7.62x39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with wooden stock;

6) Valmet M62/S 7.62x39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with metal stock;

7) Colt AR-15 Cal. 223, Model SP1, with obliterated serial number;

8) 12 gauge, Model Ten, Series 8 Police Shotgun, The High Standard Mfg. Corp. with Serial number 3210163;

9) 12 gauge Model Ten, Series 8, Police Shotgun, The High Standard Mfg. Corp. with Serial number 3224178;

10) Swiss made, calibre 75mm Fed. Ord. Inc. So. El Monte, CA., with obliterated serial number;

11) Remington Model 700, 7mm Rem. Mag. Serial number 337477;

12) Smith & Wesson .357 Magnum, 4 inch barrel, round butt, with obliterated serial number;

13) Smith & Wesson .357 Magnum, Model 19, round butt, 2½ inch barrel, with obliterated serial number;

which had previously moved in commerce, to-wit: from the State of Washington to the State of Oregon, all in violation of Section 1202(a), Title 18 Appendix, United States Code.

DATED this 25 day of November, 1975.

A TRUE BILL.

/S/ _____
FOREMAN

SIDNEY I. LEZAK
United States Attorney
District of Oregon

/S/ Tommy Hawk
TOMMY HAWK
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CR 75-296

UNITED STATES OF AMERICA

v.

KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS, WHO GIVES HER TRUE NAME AS: KA MOOK BANKS; AND ANNA MAE AQUASH, ALSO KNOWN AS ANNIE MAY PICTOU AND NAGUSET EASK, DEFENDANTS

[Filed and Entered: Dec. 22, 1975]

INDICTMENT

[26 U.S.C. Section 5861(d)
26 U.S.C. Section 5871
26 U.S.C. Section 5861(i)
26 U.S.C. Section 5861(j)
18 U.S.C. Section 922(k)
18 App. U.S.C. Section 1202(a)]

THE GRAND JURY CHARGES:

COUNT I. On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; who gives her true name as KA MOOK BANKS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly possessed a destructive device consisting of a combination of parts designed and intended for use in converting a device into a destructive device; said combination of parts consisting of: a) six (6) pocket watches, each with a hole drilled in the face with a metal screw inserted into the hole

in a position to make contact with the moving hands of the watch, with a soldered battery connector and a ground wire attached with expended flashbulbs attached; b) four (4) batteries with wires attached; and c) two (2) expended flashbulbs with wires attached; and said device consisting of watches, timing devices, electrical blasting cap leg wires, wires, electrical blasting cap, detonating cord, batteries, and seven (7) cases of Du Pont 70% dynamite, and said destructive device had not been registered to them in the National Firearms Registration and Transfer Record as required by Section 5841, Title 26, United States Code, in violation of Section 5861(d) and 5871, title 26, United States Code.

COUNT II. On or about November 14, 1975, in Malheur County, Oregon KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; who gives her true name as: KaMook Banks; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly possessed a destructive device consisting of a combination of parts designed and intended for use in converting a device into a destructive device; said combination of parts consisting of: a) six (6) pocket watches, each with a hole drilled in the face with a metal screw inserted into the hole in a position to make contact with the moving hands of the watch, with a soldered battery connector and a ground wire attached with expended flashbulbs attached; b) four (4) batteries with wires attached; and c) two (2) expended flashbulbs with wires attached; and said device consisting of watches, timing devices, electrical blasting cap leg wires, wires, electrical blasting cap, detonating cord, batteries, and seven (7) cases of Du Pont 70% dynamite, and said destructive device was not identified by serial number as required by Section 5842(c), Title 26, United States Code, and 27 CFR 179.102; in violation of Sections 5861(i) and 5871, Title 26, United States Code.

COUNT III. On or about November 14, 1975, in Malheur County, Oregon KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS; who

gives her true name as KAMOOK BANKS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly did transport in interstate commerce a destructive device consisting of a combination of parts designed and intended for use in converting a device into a destructive device; said combination of parts consisting of: a) six (6) pocket watches, each with a hole drilled in the face with a metal screw inserted into the hole in a position to make contact with the moving hands of the watch, with a soldered battery connector and a ground wire attached with expended flashbulbs attached; b) four (4) batteries with wires attached; and c) two (2) expended flashbulbs with wires attached; and said device consisting of watches, timing devices, electrical blasting cap leg wires, wires, electrical blasting cap, detonating cord, batteries, and seven (7) cases of Du Pont 70% dynamite, and said destructive device had not been registered as required by Section 5841, Title 26, United States Code; in violation of Section 5861(j) and 5871, title 26, United States Code.

COUNT IV. On or about November 14, 1975, in Malheur County, Oregon KENNETH MOSES LOUD HAWK; RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS; DARLENE PEARL NICHOLS who gives her true name as KAMOOK BANKS; and ANNA MAE AQUASH, also known as Annie May Pictou and Naguset Eask, defendants herein, wilfully and knowingly transported in interstate commerce, firearms which had their serial numbers removed and obliterated, that is:

1) a Valmet M62/S 7.62x39mm, Semi-Automatic Rifle, Interarms, with metal stock;

2) a Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with wooden stock;

3) a Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with wooden stock;

4) a Valmet M62/S 7.62×39mm, Semi-automatic Rifle, Interarms, with metal stock;

5) a Colt AR–15 Cal. .223, Model SP1;

6) a Swiss made, calibre 7.5mm Fed. Ord. Inc. So. El Monte, CA.;

7) a Smith & Wesson .357 Magnum, 4 inch barrel, with round butt;

8) a Smith & Wesson .357 Magnum, Model 19, with round butt, 2½ inch barrel; in violation of Title 18, Section 922(k), United States Code.

COUNT V. On or about November 14, 1975, in Malheur County, Oregon, DENNIS JAMES BANKS, defendant herein, a person who had been convicted by the Seventh Judicial Court, Custer, South Dakota, on July 26, 1975, of a felony, to-wit: riot while armed, did wilfully possess firearms, to-wit:

1) Safari De Luxe .30/06 rifle, Serial Number A 983 S with Williams peep sight;

2) 35 Remington, Woodsmaster, Model 81, Serial number 31264;

3) Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms with obliterated serial number, with metal stock;

4) Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with wooden stock;

5) Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with wooden stock;

6) Valmet M62/S 7.62×39mm, Semi-automatic Rifle, Interarms, with obliterated serial number, with metal stock;

7) Colt AR-15 Cal. .223, Model SP1, with obliterated serial number;

8) 12 gauge, Model Ten, Series 8, Police Shotggun, The High Standard Mfg. Corp,. with Serial number 3210163;

9) 12 gauge Model Ten, Series 8, Police Shotgun, The High Standard Mfg. Corp. with Serial number 3224178;

10) Swiss made, calibre 7.5mm Fed. Ord. Inc. So. El Monte, CA., with obliterated serial number;

11) Remington Model 700, 7mm Rem. Mag. Serial number 337477;

12) Smith & Wesson .357 Magnum, 4 inch barrel, round butt, with obliterated serial number;

13) Smith & Wesson .357 Magnum, Model 19, round butt, 2½ inch barrel, with obliterated serial number;

which had previously moved in commerce, to-wit: from the State of Washington to the State of Oregon, all in violation of Section 1202(a), Title 18 Appendix, United States Code.

DATED this 22 day of December, 1975.

/s/ _____
Foreman

SIDNEY I. LEZAK
United States Attorney
District of Oregon

/s/ _____
TOMMY HAWK
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CR 75-296

UNITED STATES OF AMERICA

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER; LEONARD PELTIER; DENNIS JAMES BANKS AND DARLENE PEARL NICHOLS, ALSO KNOWN AS KAMOOK BANKS, DEFENDANTS.

[Returned June 18, 1980]

SUPERSEDING INDICTMENT

[26 U.S.C. 5845(f)
26 U.S.C. 5861(d)
26 U.S.C. 5871
26 U.S.C. 5861(i)
18 U.S.C. 922(h)
18 U.S.C. 922(k)
18 U.S.C. 924(a)
18 U.S.C. 2
18 App. U.S.C. 1202(a)]

THE GRAND JURY CHARGES:

COUNT I

On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, LEONARD PELTIER, DENNIS JAMES BANKS, DARLENE PEARL NICHOLS, also known as KaMook Banks, defendant herein, and Anna Mae Aquash, also known as Annie May Pictou and Naguset Eask, a deceased co-defendant, knowingly possessed a destructive device consisting of a combination of parts designed and intended for use in converting a device into a destructive device; said combination of parts consisting of the following:

a) five (5) pocket watches each with a hole drilled in the face with a metal screw inserted into the hole in a position to make contact with hands of the watch, with a soldered battery connector and a ground wire attached;
b) four (4) batteries with wires attached;
c) two (2) expended flashbulbs with wires attached;
d) an Atlas electric blasting cap;
e) electrical blasting cap leg wires; and
f) seven (7) cases of DuPont 70% dynamite, and

said device consisting of the afore-mentioned items was a destructive device as defined by Section 5845(f), Title 26, United States Code, which had not been registered to the defendants or any of them in the National Firearms Registration and Transfer Record as required by Section 5841, Title 26, United States Code; all in violation of Section 5861(d) and 5871, title 26, United States Code, and Section 2, Title 18, United States code.

COUNT II

On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, LEONARD PELTIER, DENNIS JAMES BANKS, DARLENE PEARL NICHOLS, also known as Kamook Banks, defendants herein, and Anna Mae Aquash, also known as Annie May Pictou and Naguset Eask, a deceased co-defendant, knowingly possessed a destructive device consisting of a combination of parts designed and intended for use in converting a device into a destructive device; said combination of parts consisting of the following:

a) Five (5) pocket watches, each with a hole drilled in the face with a metal screw inserted into the hole in a position to make contact with the moving hands of the watch, with a soldered battery connector and a ground wire attached;
b) four (4) batteries with wires attached;
c) two (2) expended flashbulbs with wires attached;
d) an Atlas electric blasting cap;
e) electrical blasting cap leg wires; and
f) seven (7) cases of DuPont 70% dynamite, and

said destructive device as defined by Section 5845(f), title 26, United States Code, was not identified by serial number as required by Section 5842(c), title 26, United States Code,

and 27 CFR 179.102; all in violation of Sections 5861(i) and 5871, Title 26, United States Code, and Section 2, Title 18, United States Code.

COUNT III

On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, LEONARD PELTIER, DENNIS JAMES BANKS, DARLENE PEARL NICHOLS, also known as KaMook Banks, defendants herein, and Anna Mae Aquash, also known as Annie May Pictou and Naguset Eask, a deceased co-defendant, knowingly possessed a destructive device consisting of a combination of parts designed and intended for use in converting a device into a destructive device; said combination of parts consisting of the following:

a) Ensign Bickford safety fuse;
b) approximately 150 Atlas non-electric blasting caps; and
c) seven (7) cases of DuPont 70% dynamite, and

said device consisting of the afore-mentioned items was a destructive device as defined by Section 5845(f), Title 26, United States Code, which had not been registered to the defendants or any of them in the National Firearms Registration and Transfer Record as required by Section 5841, Title 26, United States Code; all in violation of Section 5861(d) and 5871, Title 26, United States Code, and Section 2, Title 18, United States Code.

COUNT IV

On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, LEONARD PELTIER, DENNIS JAMES BANKS, DARLENE PEARL NICHOLS, also known as KaMook Banks, defendants herein, and Anna Mae Aquash, also known as Annie May Pictou and Naguset Eask, a deceased co-defendant, knowingly possessed a destructive device consisting of a combination of parts designed and intended for use in converting a device into a destructive device; said combination of parts consisting of the following:

a) Ensign Bickford safety fuse;

b) approximately 150 Atlas non-electric blasting caps; and
c) seven (7) cases of DuPont 70% dynamite, and

said destructive device as defined by Section 5845(f), Title 26, United States Code, was not identified by serial number as required by Section 5842(c), Title 26, United States Code, and 27 CFR 179.102; all in violation of Sections 5861(i) and 5871, Title 26, United States Code, and Section 2, Title 18, United States Code.

COUNT V

On or about November 14, 1975, in Malheur County, Oregon, KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, LEONARD PELTIER, DENNIS JAMES BANKS, DARLENE PEARL NICHOLS, also known as KaMook Banks, defendants herein, and Anna Mae Aquash, also knwn as Annie May Pictou and Naguset Eask, a deceased co-defendant, did knowingly receive in interstate commerce certain firearms which had their serial numbers removed and obliterated, to-wit:

a) a Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with metal stock;
b) a Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with wooden stock;
c) a Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with wooden stock;
d) a Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with metal stock;
e) a Colt AR-15 Cal. .223, Model SP1;
f) a Swiss made, calibre 7.5mm Fed. ord. Inc. So. El Monte, CA.;
g) a Smith & Wesson .357 Magnum, 4 inch barrel, with round butt;
h) a Smith & Wesson .357 Magnum, Model 19, with round butt, 2½ inch barrel;

all in violation of Sections 922(k), 924(a) and 2, Title 18, United States Code.

COUNT VI

On or about November 14, 1975, in Malheur County, Oregon, DENNIS JAMES BANKS, defendant herein, a person who had been convicted by the Seventh Judicial

Court, Custer, South Dakota, on or about July 26, 1975, of a felony, to-wit: riot while armed, did knowingly receive and possess in commerce and affecting commerce certain firearms, to-wit:

a) 35 Remington, Woodsmaster, Model 81, Serial Number 31264;
b) Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with metal stock;
c) Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with wooden stock;
d) Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with wooden stock;
e) Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with metal stock;
f) Colt AR–15 Cal. .223, Model SP1, with obliterated serial number;
g) 12 gauge, Model Ten, Series 8, Police Shotgun, The High Standard Mfg. Corp. with Seriaumber 3210163;
h) 12 gauge Model Ten, Series 8, Police Shotgun, The High Standard Mfg. Corp. with Serial Number 3224178;
i) Swiss made, calibre 7.5mm Fed. ord. Inc. So. El Monte, CA., with obliterated serial number;
j) Remington Model 700, 7mm Rem. Mag. Serial Number 337477;
k) Smith & Wesson .357 Magnum, 4 inch barrel, round butt, with obliterated serial number;
l) Smith & Wesson .357 Magnum, Model 19, round butt, 2½ inch barrel, with obliterated serial number;

all in violation of Sections 1202(a), Title 18, Appendix, United States Code, and Section 2, Title 18, United States Code.

COUNT VII

On or about November 14, 1975, in Malheur County, Oregon, DARLENE PEARL NICHOLS, also known as KaMook Banks, defendant herein, being under indictment for crimes punishable by imprisonment for a term exceeding one (1) year, to-wit: Indictment number 75-193 in the United States District Court for the District of Kansas, did knwoingly receive certain firearms, to-wit:

a) 35 Remington, Woodmaster, Model 81, Serial Number 31264;
b) Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms with obliterated serial number, with metal stock;
c) Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with wooden stock;
d) Valmet M62/S 7.62×39mm, Semi-Automatic Rifle, Interarms, with obliterated serial number, with wooden stock;
e) Valmet M62/s 7.62×39mm, Semi-Automatic Rifle Interarms, with obliterated serial number, with metal stock;
f) Colt AR-15 Cal. .223, Model SP1, with obliterated serial number;
g) 12 gauge, Model Ten, Series 8, Police Shotgun, The High Standard Mfg. Corp. with Serial Number 3210163.
h) 12 gauge Model Ten, Series 8, Police Shotgun, The High Standard Mfg. Corp. with Serial Number 3224178;
i) Swiss made, calibre 7.5mm Fed. Ord. Inc. So. El Monte, CA., with obliterated serial number;
j) Remington Model 700, 7mm Rem. Mag. Serial Number 337477;
k) Smith & Wesson .357 Magnum, 4 inch barrel, round butt, with obliterated serial number;
l) Smith & Wesson .357 Magnum, Model 19, round butt, 2½ inch barrel, with obliterated serial number,

which firearms had been shipped and transported in interstate commerce; all in violation of Sections 922(h), 924(a) and 2, Title 18, United States Code.

DATED this 17 day of June, 1980.

A TRUE BILL.

/s/ _____
FREDERICK G. REEDER
FOREMAN

SIDNEY I. LEZAK
United States Attorney
District of Oregon

/s/ _____
WILLIAM W. YOUNGMAN
Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1906

UNITED STATES OF AMERICA, APPELLANT,

vs.

KENNETH MOSES LOUD HAWK, ET AL. APPELLES

DEFENDANTS' OPPOSITION TO THE GOVERNMENT'S REQUEST FOR A STAY

Defendants respectfully urge this Court to deny the Government's request for a stay of the proceedings in the instant case for the below-stated reasons:

1) The Honorable Robert C. Belloni, Chief Judge of the District Court of Oregon, who has lived with this case since November, 1975 and is familiar with the government's conduct therein, and is therefore, in the best position to evaluate the validity of the government's stance in this matter, has forcefully rejected the government's request for a stay of the proceedings.

2) The affidavit of Sidney Lezak, United States Attorney for the District of Oregon certifies that said appeal "was not taken for the purpose of delay." Yet, in open court on April 26, 1976, Mr. Lezak admitted to Judge Belloni that the government will not be ready to go to trial on May 12, 1976 as earlier agreed, and Mr. Lezak made said statement in the face of Judge Belloni's admonition that such a posture would result in the dismissal of this case.

3) The government is highly unlikely to succeed in its appeal of the District Court's Order Suppressing Evidence, in spite of its contentions to the contrary, given the presumption of validity that must be accorded such suppression order, and given the weakness of the authority upon which the government intends to rely in support of its position. (See attached memorandum of Points and Authorities.)

4) The Defendants would be highly prejudiced by any stay of the proceedings in that such stay would generally abridge

their Sixth Amendment right to a speedy trial, and would cause specific hardship for the following reasons:

a) Defendants have labored under the enormous prejudice of being designated by the Government as high-risk individuals pursuant to 18 U.S.C. 3164, a designation which does violence to the presumption of innocence. Furthermore, such designation applied to them by the Government placed an enormous financial and emotional burden upon all the Defendants and their counsel requiring the preparation of a defense in a highly complex case within ninety days. Defendants have successfully met said burden, including completion of all motions on an extraordinarily tight briefing schedule caused by the government's designation of high risk, and Defendants stand ready for trial on a date mutually agreed upon two months ago by Judge Belloni, defense counsel and counsel for the Government.

b) To comply with the U.S. Attorney's Designation of High Risk, all counsel, including two out-of-state counsel, with numerous trial commitments, were forced to re-arrange their schedules, to the inconvenience of several state courts.

c) Pursuant to an order of the Honorable Frank Theis, U.S. District Judge in Kansas, the trial of KaMook Banks, one of the co-defendants in the instant matter, has been trailed pending completion of this case. Bail in that matter was set at $20,000 cash, which bail was posted with considerable hardship to the Defendant, and a stay of the instant case would unnecessarily tie up those bail funds which the Defendant needs to support herself and her two infant children.

d) Finally, Defendant Dennis Banks faces extradition proceedings in both Oregon and in California, on a demand for his return to South Dakota. Defendant Banks has strenuously resisted extradition to that jurisdiction because of direct threats against his life by the highest law enforcement officials of South Dakota. It has been made clear to counsel for Defendant Banks, that both Governors will weigh the final outcome of the instant matter heavily in their deliberations of a case which presents such serious issues. To further delay the trial in which Defendant Banks will be exonerated

jeopardizes a favorable resolution of these important state matters.

Therefore, Defendants, for all the above and foregoing reasons, respectfully urge this Court to deny the Government's Request for a Stay.

/s/ _____
DENNIS ROBERTS
On Behalf of All of the Defendants

DATED: APRIL 26, 1976

AFFIDAVIT OF DENNIS ROBERTS

DENNIS ROBERTS, after being duly sworn, deposes and says:

That I am the attorney of record for Defendant DENNIS JAMES BANKS, one of the co-defendants in the instant matter, and that I am licensed to practice before the California Superior Court and this Honorable Court.

That the co-defendants in this case filed formal discovery motions in this matter several months ago. The Assistant United States Attorney with prime responsibility for this matter several days ago advised one of counsel for a co-defendant that *all* discoverable material in the case had been turned over to the defendants, that no further discoverable material exists and reaffirmed the committment of the Office of the United States Attorney that as said material became available it would be turned over to the defendants and their counsel immediately.

On April 14, 1976 your affiant had a meeting with said Assistant United States Attorney who turned over discovery material and made the same representations.

On April 22, 1976 your affiant received a packet of materials from defense counsel in a federal criminal matter presently under prosecution in South Dakota involving the death of two F.B.I. agents in Oglala, South Dakota. One of the defendants in that case, LEONARD PELTIER, is a co-defendant in the instant matter. Said packet contained some of the discovery turned over to defense counsel in the Oglala case by the United States Attorney in that case. Among the items discovery provided therein were items extraordinarily exemplar of the instant defendants, including, *inter alia*, the identification of fingerprints of persons other than the instant defendant whose prints were found in the vehicles containing the alleged contraband which is the subject of the instant prosecution; and evidence that handwritten material found in said vehicles can not be favorably compared with handwriting exemplars provided by the defendants from when exemplars were obtained.

Suppression of the fingerprint evidence, in light of the fact that Defendant DENNIS JAMES BANKS was not present

when the vehicles were seized and that the Government's entire case against him is built on the hypothetical that since his prints were found in the vehicle he must have been the person who drove said vehicle a few hundred feet away from the scene, mandates a dismissal for gross governmental misconduct.

The evidence of fingerprints of persons other than defendant being found in said vehicles was transmitted by the F.B.I. Latent Fingerprint Section to Special Agent in Charge (SAC) Portland on *January* 21, 22 and 26, 1976. The exculpatory handwriting material was transmitted from F.B.I, Washington, D.C. to SAC, Portland on March 12 and 15, 1976. None of this material was ever turned over to the defendants by the Government herein. Said information is presently being prepared in motion form to be presented to Judge Belloni forthwith.

/s/ _____
DENNIS ROBERTS

Sworn to and subscribed before me this 26th day
of April, 1976,

_____
LINDA S. WILLIS
Notary Public

MEMORANDUM OF POINTS AND AUTHORITIES

The Government, according to its Notice of Appeal, intends to rely on three cases, one from the 7th Circuit, *U.S.* v. *Shafer*, 445 F2d 379 (7th cir. 1971) and two from this Circuit, *United States* v. *Trenery*, 473 F2d 680 (9th Cir 1973), and *United States* v. *Sewar*, 468 F2d 236 (9th Cir. 1972), all of which cases predates this Court's opinion in *United States* v. *Heiden*, 508 F2d 898 (9th Cir. 1974), upon which the District Court relied in its Order Suppressing Evidence of March 30, 1976.

All of the above-mentioned cases can be easily distinguished from the case at bar, which involves not only the destruction of all the explosive evidence without retention of even a sample of such evidence (See Order Suppressing Evidence p.6), but also, the totally unjustified destruction of the cardboard boxes and plastic bags within which the explosives were contained, and prior to any attempt according to the Government to obtain fingerprints therefrom, although fingerprints were obtained from virtually every surface of the vehicle and its contents in which said explosives were allegedly found. "The destruction of these articles eliminated the possibility that [the Defendants] could have presented evidence rebutting this charge: i.e. they might have been able to show their fingerprints were not on the dynamite containers." (See Order Suppressing Evidence, hereinafter referred to as Order, p. 4). Furthermore, the destruction of these containers, completely eliminated the possibility that the Defendants could have adduced whose fingerprints might have been on said containers. (See affidavit of Dennis Roberts).

United States v. *Trenary*, *supra*, is totally inapposite because there the destruction of the evidence was done by foreign officials in Mexico, and not by U.S. government officials. Here, the FBI participated actively in said destruction.

In *United States* v. *Sewar*, *supra*, the inadvertent loss of evidence by a technician who had no reason to realize that the evidence should be preserved for trial, stands in sharp contrast to the findings of the District Court herein. "The of-

ficers and agents who were present at and who conducted the destruction of the dynamite and *its containers* were experienced personnel. They must have known how sensitive this case would become and how material this evidence was to the case." (See Order, pp. 4 & 5).

In *United States* v. *Shafer*, *supra*, the government was not on notice by the 7th Circuit, as was the government in the 9th Circuit, that they are "flirting with danger of reversal any time evidence is lost or inadvertently destroyed." (*United States* v. *Heiden*, supra at 903, fn.1). Furthermore, in *Shafer*, a case not involving the question of constructive possession or the possibilty of culpability by persons other than the Deendant, the Court found no concrete prejudice to the defendant who had been given samples of the residue of the destroyed evidence as well as derivative evidence obtained therefrom. "Here, none was saved. Even the wrappers were scraped clean." (See Order, p. 6).

Finally, as regards the unnecessary and totally unexplained destruction of the containers prior to any attempt to obtain fingerprint evidence therefrom and to any "opportunity for defense analysis", but rather of intentional non-preservation of highly relevant evidence. "On a spectrum between good faith but inadvertent loss and bad faith destruction ... [the Government's] conduct must lie somewhere in the middle. Perhaps it should lie somewhat closer to the latter end." *United States* v. *Bryant*, 439 F2d 642, 647 (1971).

Therefore, for all of the above and foregoing reasons, Defendants urge that the authorities upon which the Government intends to rely and distinguishable on their facts and on the applicable law, and cannot support the certification by the United States Attorney herein, that based upon such authority, the Government's chances of succeeding are great.

Respectfully submitted,

/s/ _____
DENNIS ROBERTS
On Behalf of All
Defendants

DATED: April 26, 1976

EXCERPTS OF TRANSCRIPT OF DISTRICT COURT'S MAY 12, 1976 HEARING ON MOTION TO DISMISS

[3] THE COURT: Is the defendant Kenneth Moses Loud Hawk ready for trial?

MR. SCHIFFMAN: Ready, Your Honor.

DEFENDANT LOUD HAWK: Ready.

THE COURT: Is the defendant Russ James Redner ready for trial?

MR. GERWITZ Ready, Your Honor.

DEFENDANT REDNER: We're ready, Your Honor.

THE COURT: Is the defendant Dennis James Banks ready for trial?

DEFENDANT D. BANKS: Yes, Your Honor, ready.

[4] MR. ROBERTS: Ready.

DEFENDANT D. BANKS: Ready. Get it on!

DEFENDANT REDNER: Right on!

THE COURT: Is the defendant Ka-Mook Banks ready for trial?

DEFENDANT K. BANKS: Ready, Your Honor.

MR. BAILEY: Ready, Your Honor.

THE COURT: Well, do you have a motion to make, Mr. Roberts?

MR. ROBERTS: Yes, Your Honor. We would move that this case, pursuant to 48(b), be dismissed with prejudice. The reasons for the motion, the Government has been seeking one continuance and one delay after another. We stand ready for trial, as we have stood ready for trial these several months. Our defendants' rights under the Speedy Trial Act as well as the Constitution of the United States are being flagrantly violated by the dilatory tactics of the Government in this case.

We are ready for trial. We demand our trial, we demand our day in court now. We want our total and full exoneration by a jury. This is the day set by this Court many months ago for trial. We are ready and we need our trial today.

* * * * *

[5] THE COURT: Did you want to say something, [6] Mr. Turner?

MR. TURNER: Well, I want to—after the Court's finished, Your Honor.

THE COURT: About the nature—

MR. LEZAK: Actually, Your Honor, although the Court may have the right to dismiss the case even though the Government contests that, we would really like to be heard on whether or not, under United States Code Title 18 Section 3731, the conditions of release can be set aside by the Court and exoneration of the bail can be made even under the circumstances and even accepting the Court's view. At least we would appreciate the courtesy of a hearing on that matter, Your Honor.

THE COURT: Well, how can there be a continuation of bail restrictions when the indictment is dismissed?

MR. TURNER: Your Honor, because the statute provides for that. The Appeals Act 3731 specifically provides for release pursuant to the Bail Reform Act, and we would respectfully request that the Court impose conditions of release. While we don't object to the return of the cash and the exoneration of sureties, we feel that there should at least be a recognizance release and certain other restrictions [7] imposed by the Court upon the defendants; namely, that they respond to any court orders in the event that this indictment is reinstated and the Court's order of suppression is reversed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Criminal 75-296

UNITED STATES OF AMERICA

v.

KENNETH MOSES LOUD HAWK, ET AL., DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By its order of March 6, 1978, the Court of Appeals remanded this case for specific findings of fact as to questions listed in that order. I held an evidentiary hearing May 9 and 10, 1978. Based on evidence adduced at that hearing, I make the following findings of fact:

1. DID ANY AGENT OF THE FEDERAL GOVERNMENT PARTICIPATE IN THE DESTRUCTION OF THE EVIDENCE?

(a) *The search for, and possession of, the evidence destroyed.* The substance at issue, which I shall call dynamite for the purpose of these findings, was found in a station wagon which had been stopped by state police officer Griffiths pursuant to a federal All Points Bulletin. That bulletin directed that the vehicles mentioned in it not be stopped but that the FBI be notified should those vehicles be sighted. Officer Griffiths had not read the entire bulletin and stopped a motor home and the station wagon under the impression that the bulletin required it. The motor home and station wagon were towed to a garage in Ontario, Oregon, their occupants having escaped the scene of the stop. The stop took place at about 10:00 pp.m. on November 14, 1975. No search of the vehicles was done at the scene of the stop.

FBI agents participated in a search of the scene of the stop for fugitives and set up headquarters at the Oregon State Police Office in Ontario. By November 15, there were approximately 15 FBI agents in Ontario.

The motor home and station wagon were searched November 15 pursuant to a state search warrant at the garage in Ontario. No federal agent participated in the decision to obtain that warrant. About two federal agents were present at the garage during the entire search of both vehicles. Federal agents observed the search of both vehicles but did not participate directly except that federal agent Hancock entered the motor home on one occasion.

Firearms were found in the motor home, which was searched first, and federal agents were told of this fact. Federal agents then suggested that the station wagon be searched for firearms. State officers opened the station wagon and found the dynamite immediately. Federal agents did not participate physically in the search of the station wagon, and no federal warrant had been obtained. Federal agents did observe the search and photograph the dynamite as it appeared in the station wagon.

On November 16, the dynamite was transferred from the station wagon to a state police car by state officers. Federal agents did not participate physically but did observe and photograph the dynamite as it appeared in the trunk of the state police car. Federal agents did not advise or direct any action with respect to the removal or transportation of the dynamite. Federal agents made no request that any of the dynamite be preserved for their purposes. Had such a request been made, state police would have complied.

(b) *The decision not to transport the dynamite for safekeeping*. The decision not to keep the dynamite was made by Trooper Fettig of the state police, pursuant to an unwritten policy defined by his practice of six years before November 1975. Trooper Fettig's practice of destroying explosives was based on the lack of state storage facilities, problems with chain of custody and public safety considerations. Federal agents did not actively participate in Trooper Fettig's decision not to transport the dynamite for safekeeping. Federal agents were present and aware of Trooper Fettig's intended destruction of the dynamite and neither encouraged nor discouraged such action.

(c) *The decision to destroy, and the actual destruction of, the dynamite and containers.*

The decision to destroy, like the decision not to transport the dynamite, and containers was made by Trooper Fettig, pursuant to state police policy and in his discretion. No federal agent participated in this decision. Federal agent Milam, the only federal agent present at the destruction of the dhynamite and containers, rode with a state officer in a car following Trooper Fettig's to a gravel pit outside Ontario for the purpose of observing and photographing the destruction. Agent Milam neither encouraged nor discouraged the destruction of the dynamite and containers.

(d) *Any other actions or inactions relevant to the destruction of the evidence.*

John O'Rourke, Special Agent in Charge of Oregon, was in Ontario before the dynamite was destroyed. He knew that Beverly Axelrod, counsel for defendants was also in Ontario before the destruction of the dynamite. O'Rourke made no effort to inform Axelrod of the impending destruction of the dynamite, of which he was aware. Axelroad never asked O'Rourke to be allowed to witness the destruction of the dynamite. No representative of defendants witnessed the destruction.

(e) *Any other actions or inactions to preserve samples or secondary evidence.*

After destroying the dynamite, Trooper Fettig gave Federal Agent Milam seven wrappers from sticks of dynamite, which have been preserved by the federal government. Trooper Fettig scraped the dynamite from these wrappers for safety reasons before giving them to Agent Milam. Because of this scraping, it was not possible later to identify positively the substance which had been contained in the wrappers. Trooper Fettig retained, scraped and gave the wrappers to Agent Milam without any suggestion from Agent Milam (the only federal agent at the scene) that he do or not do any of these things.

Federal agents took photographs of the boxes of dynamite in the station wagon, in Trooper Fettig's car and at the destruction site. Federal Agent Milam photographed the actual destruction of the dynamite.

2. WHAT PREJUDICE, IF ANY, WAS SUFFERED BY THE DEFENDANTS AS A RESULT OF THE DESTRUCTION OF THE DYNAMITE?

Defendants were prejudiced to the extent that their inability to observe the destruction of the dynamite or to analyze samples of it deprived them of the opportunity to contest the government's conclusion that the substance destroyed was indeed explosive. Defendants' only argument on this point is now limited to analysis of the photographs of the destruction of the dynamite. The testimony of witness McCreary concerning the photographs of the destruction of the dynamite cast substantial doubt on the assertion that the photographs showed the detonation of dynamite. The fact that defendants were denied the opportunity to witness the destruction or to examine samples of the dynamite therefore appears to have prejudiced defendants substantially on the issue of the nature of the substance destroyed.

Defendants were also prejudiced by the destruction of the cartons and plastic bag which contained the dynamite in that they were deprived of the opportunity to determine by fingerprinting who might have handled these items.

Dated this 23rd day of August, 1978.

/s/ _____
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3067
No. CR 75-296-RE, USDC Or.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER,
DENNIS JAMES BANKS, KAMOOK BANKS,
DEFENDANTS-APPELLEES

DEFENDANTS-APPELLEES OPPOSITION TO GOVERNMENT'S MOTIONS TO STAY AND TO RECALL MANDATE

Defendant-Appellee DENNIS JAMES BANKS, by and through his counsel, Kenneth S. Stern of Rose & Stern, on behalf of himself and all other defendants-appellees most vigorously urges this Court to deny the Government's Motion to Stay and to Recall the Mandate issued in this case on January 16, 1985 and received by the District Court on January 18, 1985.

SUMMARY OF ARGUMENT

Since the mandate has issued, affirming Judge Redden's ORDER dismissing the indictment with prejudice, the Government's Motions to Stay Mandate and Recall Mandate are moot. Furthermore, under the circumstances of this case, this Court no longer has jurisdiction to grant the government's requested relief.

FACTUAL BACKGROUND

After this Court issued its opinion in late August of 1984, the Government filed its Petition for Reconsideration. That Petition was denied on January 8, 1985. Federal Rule of Appellate Procedure 41(b) requires a Motion for a Stay of Mandate Pending Application for Certiorari to be filed or the

mandate shall issue within 7 days after the petition for rehearing is denied. FRAP 41(a). As no such motion was filed. The mandate issued on January 16, 1985 and was received by the District court on January 18, 1985.[1] Defense counsel informed their clients that the receipt of the mandate put Judge Redden's ORDER dismissing the case into effect. They were informed that for the first time in ten years the Government was no longer actively trying to prosecute them. They were told that the case was dead.

Eight days after the burden of these charges was finally lifted from the defendants' lives, defense counsel received a MOTION to STAY MANDATE—and three days later a MOTION to RECALL MANDATE. Apparently the Government has not yet finally decided to let this case enjoy its quiet and well deserved death. However, the Government can point to no Rules of Appellate Procedure that provide this Court with the powers of resurrection.

ARGUMENT

MOOTNESS

The MOTION TO STAY MANDATE is clearly moot as it was filed *after* the mandate has been properly issued pursuant to FRAP 41.

LACK OF JURISDICTION

The "appellate process is terminated . . . when an appellate court issues its mandate of affirmance." *United States* v. *Cook*, 705 F.2d 351 (9th Cir., 1963).

Once a mandate issues jurisdiction is terminated. However, jurisdiction may be reasserted by recalling the mandate in some circumstances. This case does not represent one of those few circumstances.

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[1] The ORDER denying reconsideration is appended hereto as Exhibit "A", the first page of the mandate as Exhibit "B,", the MOTION TO STAY MANDATE as Exhibit "C," and the MOTION TO RECALL MANDATE as Exhibit "D." It should also be noted that defense counsel have not received serivce of any petition for certiorari to this date, and have no knowledge of any such petition having been filed.

Only where the mandate was erroneously issued, or where it must be changed in order to effectuate the judgement may it be recalled. Litigation is "settled" once a mandate issues, and it should be recalled "sparingly" and then only under "exceptional circumstances" where "good cause" is shown *Dilley* v. *Alexander*, 627 F.2d 407, 410 (D.C. Cir., 1980). See: Wright, 16 Federal Practice and Procedure Sec 3938 (pps 276-290) and 5B C.J.S. Sec. 1995-1996 (pps. 648-652).

The Government does not not allege any "good cause"[2] in its motion, and for good reason. This Court did not err in issuing its mandate, nor does the mandate need to be "corrected" in any fashion. Defendants know of no case that suggests that the Court has jurisdiction to recall the mandate in order to undo the effect of the Government's unexcused and unexplained failure to file a timely motion to stay mandate. Indeed, obvious policy considerations militate against granting the Government's requested relief, even if this Court did have jurisdiction.

Additionally, even if a Court can reassert jurisdiction by recalling a mandate in some circumstances, it is unclear whether it can do so once a criminal action has been dismissed. The issuance of a mandate puts "the appellate decision into effect." *Wald* v. *Regan*, 706 F.2d 794, 803 (1st Cir., 1983). The appellate court decision in the instant case was not one that merely returned jurisdiction to the District Court to proceed further. The mandate affirmed Judge Redden's ORDER dismissing this case with prejudice, and put said order into effect. In essence, it was the entrance of a "final judgement." See: *United States* v. *Tulare Lake Canal Co.*, 677 F.2d 713, 715 (9th Cir., 1982). This case was DISMISSED WITH PREJUDICE since January 16, 1985. It remains dismissed. In this circumstance, this Court has no jurisdiction to breathe life into it again—and any attempt to do so would profoundly impact defendant's constitutional rights, including, but not limited to, their rights to due process of the laws and to be free from cruel and unusual punishments.

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[2] In fact, the Government suggests no reason at all why the mandate should be recalled.

CONCLUSION

Once the mandate of this Court issues affirming a lower court, the "appellate process is terminated." *Catmitsch* v. *Ricsley*, 705 F.2d 351 (9th Cir., 1983). On January 19, 1985[3] for the first time in ten years, the defendants were advised that the word "dismissed" actually meant that the Government was both disinclined to continue prosecuting them, and barred from changing its mind. They were told that the "appellate process is terminated," Judge Redden's ORDER dismissing the case with prejudice had actually gone into effect. They were told that the Government could no longer appeal that ORDER. They were told that the issuance of the mandate meant that the case was over, finally.

For whatever reason, the Government chose not to file a Motion to Stay Mandate. The mandate issued, and has taken effect.

"History repeats itself—first as tragedy, then as farce." In 1976 the Government delayed unnecessarily, but was allegedly not sufficiently "forewarned" of the consequences of that delay. Rule 41 is its own forewarning. No timely motion to stay, as required by the rule, was filed. The mandate issued. This case is dismissed with prejudice, pursuant to the judgement of the Ninth Circuit. It may be pursued by the Government no further.

For all the foregoing reasons, counsel plead with this Court to deny the Government's motions.

Finally, it should be noted that counsel would be hard pressed to explain to their clients how the ressurrection of this case once the final death certificate has been filed by

[3] The day counsel received a copy of the mandate.

this Court does not support their perception of the "forked tongue syndrome."

Respectfully submitted,

ROSE & STERN,

/s/ _____

KENNETH S. TERN
ROSE AND STERN
Suite 101 Kellogg Building
1935 SE Washington St.
Milwaukie, Oregon 97222
(503) 654-7792

Of Attorneys for Defendants-Appellees

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT COURT

No. 83-3067

UNITED STATES OF AMERICA, APPELLANT,

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, AND DARLENE PEARL NICHOLS, A/K/A KAMOOK BANKS, APPELLEES

[Filed January 8, 1985]

Before: WALLACE AND CANBY, *Circuit Judges* and CRAIG*, *District Judge*

A majority of the panel as constituted above has voted to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

EXHIBIT "A"

*The Honorable Walter Early Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No 83-3067
DC CV 75-296

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES RENDER, DENNIS JAMES BANKS, AND DARLENE PEARL NICHOLS, AKA KAMOOK BANKS, DEFENDANTS-APPELLEES

APPEAL from the United States District Court for the PORTLAND District of OREGON

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the PORTLAND District of OREGON

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered: AUGUST 30, 1984

EXHIBIT "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3067
No. CR 75-296-RE, USDC Oregon

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER,
DENNIS JAMES BANKS, AND DARLENE PEARL NICHOLS,
ALSO KNOWN AS KAMOOK BANKS,
DEFENDANTS-APPELLEES.

MOTION TO STAY MANDATE

The United States of America by Charles H. Turner, United States Attorney for the District of Oregon, moves the Court for an order staying the issuance of the mandate in the above case pending resolution of the Government's petition for certiorari.

Dated this 24th day of January, 1985.

Respectfully submitted,

/s/ _____

CHARLES H. TURNER
United States Attorney
District of Oregon
312 United States Courthouse
620 S.W. Main Street
Portland, OR 97205
(503) 221-2766
FTS: 423-2766

EXHIBIT "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3067
No. CR 75-296-RE, USDC Oregon

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MOSSES LOUD HAWK, RUSS JAMES REDNER,
DENNIS JAMES BANKS, AND DARLENE PEARL NICHOLS,
ALSO KNOWN AS KAMOOK BANKS,
DEFENDANTS-APPELLEES.

MOTION TO RECALL MANDATE

The United States of America by Charles H. Turner, United States Attorney for the District of Oregon, moves the Court for an order recalling the mandate in the above case pending resolution of the Government's petition for certiorari.

Dated this 29th day of January, 1985.

Respectfully submitted,

/s/ _____

CHARLES H. TURNER
United States Attorney
District of Oregon
312 United States Courthouse
620 S.W. Main Street
Portland, OR 97205
(503) 221-2766
FTS: 423-2766

EXHIBIT "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT COURT

No. 83-3067

UNITED STATES OF AMERICA, APPELLANT,

v.

KENNETH MOSES LOUD HAWK, RUSS JAMES REDNER, DENNIS JAMES BANKS, AND DARLENE PEARL NICHOLS, A/K/A KAMOOK BANKS, APPELLEES

[Filed Feb. 28, 1985]

ORDER

Before: WALLACE AND CANBY, *Circuit Judges* and CRAIG*, *District Judge*

The motion of the United States to recall and stay the mandate is DENIED.

*The Honorable Walter Early Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

Supreme Court of the United States

No. 84-1361

UNITED STATES, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

ORDER ALLOWING CERTIORARI. Filed *April 15, 1985.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

Office - Supreme Court, U.S.
FILED
JUN 11 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1361

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether time consumed by appellate review should be excluded from the length of delay relevant under the Speedy Trial Clause of the Sixth Amendment, where the government successfully appealed pursuant to 18 U.S.C. 3731 from orders dismissing the indictment and suppressing evidence, and respondents were free of all restrictions on their liberty during the appeals.

2. Whether delay attributable to respondents' interlocutory appeal should be considered in evaluating their speedy trial claim.

3. Whether, even if time on appeal should be included under the Speedy Trial Clause, respondents' right to a speedy trial has been violated under the test of *Barker* v. *Wingo*, 407 U.S. 514 (1972).

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, defendants Russ James Redner, Dennis James Banks, and Darlene Pearl Nichols, also known as KaMook Banks, were appellees below and are respondents herein.

Charges against defendant Leonard Peltier were severed from this action and later dismissed. Defendant Anna Mae Aquash is deceased.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1361

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming the dismissal of the indictment on the ground that respondents' right to a speedy trial was violated (Pet. App. 1a-25a) is reported at 741 F.2d 1184. The opinion of the court of appeals addressing respondents' vindictive prosecution claims (Pet. App. 26a-35a) is reported at 682 F.2d 841. The opinion of the en banc court of appeals reversing the district court's suppression order and its order dismissing the indictment with prejudice (Pet. App. 36a-87a) is reported at 628 F.2d 1139. The panel opinion in that appeal (Pet. App. 88a-118a) is unreported. The district court's opinion dismissing the indictment on

speedy trial grounds (Pet. App. 119a-138a) is reported at 564 F. Supp. 691. The district court's orders on the vindictive prosecution motion (Pet. App. 139a-143a, 144a-148a), its bench ruling dismissing the indictment under Fed. R. Crim. P. 48(b) (Pet. App. 149a-151a), and its suppression order (Pet. App. 152a-157a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 158a-159a) was entered on August 30, 1984. A petition for rehearing was denied on January 8, 1985 (Pet. App. 160a). The petition for a writ of certiorari was filed on February 26, 1985, and was granted on April 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

Respondents were apprehended on November 14, 1975, and charged on December 22, 1975, with unlawfully possessing and transporting dynamite and firearms. Because of protracted litigation over pretrial defense motions, respondents have yet to be tried. Twice, respondents convinced the district court to dismiss all or part of the indictment. Both times, the government prevailed in the court of appeals. Following the last remand, the district court once again dismissed the indictment, ruling that respondents' Sixth Amendment right to a speedy trial had been violated (Pet. App. 119a-138a). The court of appeals affirmed (*id.* at 1a-25a). A summary chronology of the complex proceedings in this case is set forth at Pet. App. 161a.

1. a. On November 13, 1975, the Federal Bureau of Investigation notified Oregon law enforcement authorities that federal fugitives might be traveling through the state in a motor home and station wagon. The FBI's teletype message described both vehicles and provided the license number of the motor home. The next day, Oregon state trooper Griffiths observed two vehicles fitting the FBI's description. After verifying the license number of the motor home, he stopped the vehicle and told its occupants to step outside. Former defendants Peltier and Aquash stepped out of the motor home, followed by respondent KaMook Banks and her infant child. Griffiths was told that no one else was inside. Just then the motor home accelerated quickly and Peltier fled, jumping over a nearby fence and exchanging gunfire with Griffiths. Griffiths then followed the motor home and found it one-half mile from the initial stop, with no one inside.[1] Meanwhile, another state trooper approached the station wagon, which had stopped behind the motor home, and ordered its occupants out of the car. Respondents Redner and Loud Hawk emerged. Both vehicles were locked and impounded while search warrants were obtained. Pet. App. 37a-40a.

Searches of the two vehicles pursuant to state and federal search warrants[2] disclosed 350 pounds of

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[1] The government would introduce evidence at trial showing that respondent Dennis Banks was the driver of the motor home. Banks was not arrested until January 26, 1976.

[2] State warrants were obtained and executed on November 15, 1975. Federal warrants were obtained and executed the following day. Pet. App. 40a & n.3.

dynamite, 6 partially assembled time bombs, and a loaded .44 caliber revolver in the station wagon, and 2600 rounds of ammunition, 150 blasting caps, 9 empty hand grenades, and 13 firearms, 8 of which had obliterated serial numbers, in the motor home. On November 16, 1975, Oregon state law enforcement officers removed the dynamite and destroyed it without consulting federal officials. Pet. App. 40a-42a & n.4, 45a-46a. Photographs were taken of the dynamite and of its detonation (*id.* at 41a, 42a, 47a, 52a).

b. On December 22, 1975, a five-count superseding indictment was returned against respondents in the United States District Court for the District of Oregon (J.A. 151-155). The first three counts charged respondents with unlawful possession and transportation of an unregistered and unnumbered destructive device, including seven cases of dynamite, along with timing devices and detonating materials, in violation of 26 U.S.C. 5861(d), (i) and (j), 5871. Count four charged respondents with unlawfully transporting firearms whose serial numbers had been obliterated, in violation of 18 U.S.C. 922(k).[3] Count five charged Dennis Banks with possession of firearms by a convicted felon, in violation of 18 U.S.C. App. 1202(a).

2. a. On December 24, 1975, respondents filed a motion to dismiss the destructive device charges or, alternatively, to suppress any secondary evidence relating to the dynamite, because of its destruction by the state police. Clerk's Record (C.R.) 17; see

[3] Counts 1 through 4 also charged Peltier and Aquash. Peltier's case was severed and the charges against him later dismissed. Aquash is now deceased.

J.A. 39. On January 21, 1976, on the motion of respondents, the trial was postponed until March 8, 1976 (C.R. 36, 37 39; see J.A. 41-43). The court denied respondents' suppression motion on January 23, 1976 (C.R. 38; see J.A. 43), but thereafter granted their request for reconsideration (C.R. 43; see J.A. 43-44) and ordered a pretrial evidentiary hearing. On respondents' motion and over the objection of the government, trial was again continued until May 12, 1976 (C.R. 62, 64; see J.A. 46).

Hearings on respondents' motion to dismiss or to suppress evidence of the dynamite were held on March 19 and 22, 1976 (C.R. 81, 85; see J.A. 47). The district court granted the motion on March 31, 1976, suppressing "all evidence, tangible and intangible, relating to" the dynamite (Pet. App. 157a). The government filed a notice of appeal from the suppression order on April 19, 1976 (C.R. 115; see J.A. 49), and sought a continuance of the May 12 trial date pending resolution of the appeal (C.R. 120, 121; see J.A. 50). The government repeatedly urged that its right to appeal would be vitiated if it were forced to go to trial before the appeal was decided and without the suppressed evidence (*e.g.*, C.R. 133, 136, 139; 4/26/76 Tr. 5-7; see J.A. 51). The continuance was denied by the district court, and a stay of trial was denied by the court of appeals (see J.A. 1).

When the case was called for trial on May 12, 1976, the government, consistent with its earlier representations, refused to proceed because of the pending appeal (Pet. App. 150a; C.R. 142; see J.A. 51). The district court thereupon dismissed the entire indictment with prejudice, invoking Fed. R.

Crim. P. 48(b).[4] Pet. App. 151a; C.R. 142; see J.A. 51. The government immediately appealed from the dismissal (C.R. 149; 5/12/76 Tr. 12; see J.A. 52). The two appeals were consolidated and ordered to be expedited (see Pet. App. 123a; J.A. 1, 2, 8). Respondents were unconditionally released during the appeal (C.R. 142; see Pet. App. 151a; J.A. 51).

b. The government filed its opening brief on June 28, 1976, and its reply brief on August 2, 1976 (see J.A. 2). The appeal was argued and submitted on October 15, 1976 (Pet. App. 123a; see J.A. 2). A divided panel of the court of appeals affirmed on July 26, 1977 (Pet. App. 88a-118a). The government's petition for rehearing with suggestion for rehearing en banc was filed on September 6, 1977 (see J.A. 3) and granted on October 17, 1977 (Pet. App. 123a; see J.A. 3). The case was reargued to the full court on November 9, 1977 (see J.A. 4). On March 6, 1978, the court of appeals remanded to the district court for an evidentiary hearing on whether federal officials participated in the destruction of the dynamite and whether respondents suffered any prejudice from its destruction (C.R. R-1;[5] Pet. App. 44a-45a, 123a; see J.A. 4). The court of appeals retained jurisdiction over the case and requested findings from the district court within 45 days (C.R. R-1, at 2; Pet. App. 45a). The district court held the hearing on May 9 and 10, 1978 (see J.A. 55)

[4] Fed. R. Crim. P. 48(b) provides:

> If there is unnecessary delay * * * in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

[5] The designation "C.R. R-" refers to the numbering system used in the Clerk's Record after March 1, 1978 (see J.A. 54).

and issued its findings on August 23, 1978 (J.A. 171-174).

On August 7, 1979, the court of appeals, sitting en banc, reversed the suppression order and ordered the dynamite counts reinstated (Pet. App. 36a-87a). The court also determined that while the government could have gone to trial on the firearms counts pending the appeal, the district court erred in dismissing those counts with prejudice (*id.* at 60a-62a). Accordingly, the court ordered that the district court reconsider its dismissal of those counts (*id.* at 62a). Respondents' petitions for rehearing and certiorari were denied on October 1, 1979 (see J.A. 6) and March 3, 1980 (445 U.S. 917), respectively. The mandate of the court of appeals issued on March 12, 1980, 46 months after the government took its appeal from the dismissal of the indictment (Pet. App. 4a; see J.A. 7).

3. a. On remand, the government contended that the firearms counts should be reinstated rather than presented again to a grand jury (4/14/80 Tr. 5). Respondents argued that those counts could not be reinstated (5/12/80 Tr. 6-7). On May 12, 1980, the court ordered the government to reindict on the firearms charges (5/12/80 Tr. 7; see J.A. 57). Following respondents' requests for continuances (C.R. R-41, R-45, R-50, R-51; 4/14/80 Tr. 9-10; 5/12/80 Tr. 14-15; see J.A. 57), the court set trial for September 3, 1980 (5/12/80 Tr. 20; see J.A. 58). Respondents stipulated that the pendency of numerous pretrial motions created excludable delay under the Speedy Trial Act (18 U.S.C. 3161 *et seq.*) running from March 17, 1980, the date the mandate was received, until all of the motions were decided (5/12/80

Tr. 18-19; see J.A. 58).[6] By April 24, 1980, at least 19 pretrial defense motions were outstanding (4/14/80 Tr. 9; C.R. R-33, R-37, R-39; see J.A. 56), and on that date respondents filed a motion requesting another two weeks for the filing of additional pretrial motions (C.R. R-41; see J.A. 57).

The grand jury returned a superseding indictment on June 18, 1980 (J.A. 156-161). The new indictment charged respondents with two of the three original destructive device counts and added two new destructive device counts. It charged respondents with the original firearms count (although it substituted "receiving" for "transporting") and again charged Dennis Banks with being a felon in possession of firearms. The indictment also charged KaMook Banks with a new count of receiving firearms while under indictment, in violation of 18 U.S.C. 922(h)(1).

Respondents filed a number of new motions in response to the superseding indictment (C.R. R-88, R-90, R-92, R-93, R-95-99, R-102, R-103, R-105; see J.A. 61-64), including a motion to dismiss on the ground of vindictive prosecution (C.R. R-97; see J.A. 63). On August 8, 1980, the district court granted the vindictive prosecution motion as to KaMook Banks and denied it as to the other respondents (Pet. App. 139a-143a, 144a-148a). Those respondents filed notices of appeal between August 15 and 22, 1980, and the government noticed an appeal from the dismissal of charges against KaMook Banks on September 2, 1980 (C.R. R-125, R-130, R-133, R-139; see

[6] At the time, the parties were under the misimpression that the mandatory dismissal sanction of the Speedy Trial Act applied to this case. See generally 18 U.S.C. 3163(c); *United States* v. *Watson*, 623 F.2d 1198, 1202 & n.8 (7th Cir. 1980).

J.A. 67-68). The appeals were consolidated and ordered to be expedited (C.R. R-144-146, R-149; see J.A. 14-15, 20-21, 24-25, 28-29, 69). Respondents remained free during the appeal on their own recognizance.

b. Respondents filed their opening brief on October 15, 1980, and the government filed its brief on November 3, 1980 (see J.A. 16). The appeal was argued and submitted on January 7, 1981 (see J.A. 17). On July 29, 1982, the court of appeals reversed the dismissal of the indictment with respect to KaMook Banks[7] and dismissed the interlocutory appeals of the other respondents for want of jurisdiction (Pet. App. 26a-35a; C.R. R-190).[8] Respondents' petitions for rehearing and certiorari were denied on October 5, 1982 (see J.A. 18) and January 10, 1983 (459 U.S. 1117), respectively. The court of appeals' mandate issued on January 31, 1983, 29 months after the appeals were filed (see Pet. App. 5a; J.A. 19).

4. a. With trial set for June 13, 1983 (after one continuance obtained by the government and two ordered by the court on its own motion),[9] the district court, on May 20, 1983, again dismissed the indictment, ruling that respondents' Sixth Amendment right to a speedy trial had been violated (Pet. App. 119a-138a). The court also decided that the delay

[7] The government did not contest the dismissal of the newly added count of receiving firearms while under indictment.

[8] On June 28, 1982, this Court had held that the courts of appeals are without jurisdiction to review interlocutory orders denying motions to dismiss on the ground of vindictive prosecution. *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263.

[9] Pet. App. 125a; C.R. R-196-198, R-223, R-225; see J.A. 71, 73).

violated the Due Process Clause (Pet. App. 129a-130a n.7). The government filed a notice of appeal on June 17, 1983 (see J.A. 78) and unsuccessfully urged the district court to request that the court of appeals expedite the appeal (C.R. R-268, at 2 n.3; 6/30/83 Tr. 14; see J.A. 105). The court of appeals, however, treated the appeal as expedited (see J.A. 32). As before, respondents were free of all restrictions during the appeal. Respondents have not been in custody since early 1976 (Pet. App. 9a, 136a; C.R. 43, 45, 50, 51; see J.A. 43-45).

b. The government's opening brief was filed on August 16, 1983, and its reply brief on September 27, 1983 (see J.A. 34, 35). The appeal was argued on January 4, 1984 (see J.A. 35). A divided panel of the court of appeals affirmed the dismissal on August 30, 1984 (Pet. App. 1a-25a).

The court applied the four-part balancing test set forth in *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972), assessing the length of the delay, the reasons for the delay, respondents' assertion of their right to a speedy trial, and the degree of prejudice to respondents. The majority counted the entire 90 months from the November 1975 arrests until the May 1983 dismissal as the relevant period of delay, including the entire length of time expended on the two earlier appeals, which consumed 75 of those 90 months (Pet. App. 11a). In counting the time on the government's appeals, during which charges had been dismissed, the court distinguished *United States* v. *MacDonald*, 456 U.S. 1 (1982), which held that the Speedy Trial Clause does not apply to periods when charges have been dismissed, on the ground that the dismissal in *MacDonald* was voluntary, while here the dismissals were over the government's objections (Pet. App.

8a). The court did not find it significant that respondents "were not incarcerated or subjected to other restrictions on their liberty during the time when the indictments had been dismissed" (*id.* at 9a).

Assessing the reasons for the delay, the majority counted against the government the court's own lengthy delay in deciding the first appeal (Pet. App. 12a-13a). The court found postponement of trial on the firearms counts "wholly unnecessary" and therefore weighed the appeal time heavily against the government with respect to those counts (*id.* at 12a). With respect to the dynamite counts, the court found that the government's appeal of the suppression order was clearly justified and that the delay was largely attributable to the court's own processes, a "neutral" reason that it weighed against the government, although not heavily (*id.* at 13a). The court purported to weigh the time spent on the second appeal against neither the government nor the defendants, although it did not excuse the delay, except for the six months spent on respondents' frivolous certiorari petitions (*id.* at 14a-15a). The court considered the 23 months that the appeal was before it a reasonable time, involving "no * * * undue delay" (*id.* at 15a).

The majority also found that respondents had adequately asserted their right to a speedy trial by demanding a trial at the time the government was appealing the suppression order, by moving to dismiss on speedy trial grounds following the first round of appeals, and by objecting to continuances following the last remand (Pet. App. 15a). Finally, although the majority acknowledged that respondents had not suffered prolonged incarceration, it did find prejudice resulting from the pendency of unresolved charges and a slight amount of prejudice resulting from the

deaths and fading memories of some witnesses (*id.* at 16a-17a). Balancing all of these factors, and concluding that "[t]he most weighty factor by far is the length of delay" (*id.* at 17a), the majority held that respondents' Sixth Amendment right had been violated (Pet. App. 18a). The court did not address respondent's due process claim.

In dissent, Judge Wallace concluded that *United States* v. *MacDonald*, *supra*, required exclusion from the length of delay of the time when no live indictment was outstanding (Pet. App. 19a-23a). Nor did he count the period during the interlocutory appeals by the respondents other than KaMook Banks (*id.* at 24a). He concluded that the remaining time, between six months and one year for the various respondents, did not violate the Speedy Trial Clause (Pet. App. 24a-25a).

SUMMARY OF ARGUMENT

Respondents were apprehended in November 1975 and charged soon thereafter. As a result of respondents' extensive pretrial motion practice and ensuing appeals by both sides, the government has thus far been unable to bring them to trial. Although the government had prevailed on every appeal, respondents have now reaped the windfall of a dismissal of the indictment predicated on the time consumed by the court of appeals in correcting the errors committed by the district court at respondents' behest.

A. This result cannot be squared with the values underlying the Speedy Trial Clause. The correct constitutional rule is the one adopted by Congress in the Speedy Trial Act (18 U.S.C. 3161 *et seq.*)—the delay occasioned by pretrial appeals should be excluded from the relevant length of delay. This rule recog-

nizes that pretrial appellate proceedings generally result from a defendant's own pretrial motions. Those motions, which in principle seek to enforce the rights of the accused, are themselves often used by the defense as a device to delay trial. Whatever their motivation in a particular case, however, the defendant can hardly fail to be aware of the time that must be expended by the district court to decide them and by the court of appeals to review them when such review is available prior to trial. Especially where, as here, the government obtains a reversal on appeal, the time consumed by appellate review cannot reasonably be the foundation for a defendant's subsequent claim of a violation of his right to a speedy trial.

Any other result would seriously injure society's interest in fair trials reaching just verdicts, which Congress has determined requires that the government be permitted to appeal in the circumstances specified in 18 U.S.C. 3731. The different nature of trial and appellate proceedings and the different causes for delay at the two levels mandate different treatment under the Speedy Trial Clause. Because of the length of time necessarily consumed by appellate review, including that time in the constitutional balancing test under *Barker* v. *Wingo*, 407 U.S. 514 (1972), would turn virtually every pretrial appeal into a presumptive Sixth Amendment violation. Just as the Double Jeopardy Clause does not stand as a bar to retrial following appellate review, so the Speedy Trial Clause should not require dismissal of an indictment on account of such review. If appellate delay is a significant problem for the criminal justice system, it is best addressed by legislation or local court rules prescribing mandatory time periods for appellate decisions, not by ad hoc constitutional decisionmaking.

This Court's decision in *United States* v. *MacDonald*, 456 U.S. 1 (1982), also establishes that the Speedy Trial Clause was not violated in the circumstances of this case. The indictments against respondents had been dismissed and remained so while the appeals were pending; there accordingly were no pending charges that could be speedily tried. In addition, respondents were not subject to any actual restraints on their liberty during the appeals. Accordingly, the Speedy Trial Clause does not apply to those periods. Finally, the time consumed by respondents' own interlocutory appeal obviously cannot be considered as delay supporting their speedy trial claim.

B. As an alternative to excluding appeal time entirely from the analysis, the time might be included in the first instance but then either excused or counted against the defendant under the second *Barker* factor, the reasons for the delay. Although this approach, if properly applied, may lead to appropriate results, we think it less desirable than a blanket exclusion of time (which would include an exception for truly egregious circumstances). It would waste judicial resources to require courts to undertake the full *Barker* balancing inquiry in every case, when the results would be the same as if appeal time had not been included at all, thus not triggering analysis of the other factors. A general rule simply excluding this time from consideration—as opposed to a rule finding a presumptive constitutional violation each time an appeal is taken—would promote both efficiency and consistency.

C. Even if appeal time is included in the analysis and weighed against the government, the other *Barker* factors conclusively demonstrate that no constitutional violation occurred in this case. Respondents have demonstrated no prejudice and have utterly failed to assert their right to a speedy trial in any meaningful fashion. Rather, they have consistently sought, with obvious success, to delay their trial as long as possible. It truly would distort the Speedy Trial Clause to reward respondents for their tactics by the dismissal of the indictment with prejudice.

ARGUMENT

THE DELAY ATTRIBUTABLE TO APPELLATE REVIEW OF RULINGS ON PRETRIAL DEFENSE MOTIONS DID NOT VIOLATE RESPONDENTS' SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL

In this case, respondents were apprehended in November 1975 transporting a substantial arsenal of firearms, ammunition, and explosives, much of which it was illegal for them to receive, possess, or transport. Although respondents were promptly indicted, the government has thus far been unable to bring them to trial on the rather straightforward charges growing out of this incident, due largely to respondents' repeated and partially successful efforts to avert or delay trial and to prevent the government from utilizing all of its available evidence in prosecuting those charges.[10] More than six of the seven and one-

[10] As a glance at the district court docket entries (J.A. 38-145) will reveal, what should have been a relatively simple proceeding has been confounded by a barrage of defense motions, seeking among other things such relief as the appointment of a Native American judge (J.A. 45), the transcription of future grand jury proceedings (J.A. 41), the use of a larger courtroom (J.A. 50), and the dismissal of the indictment on such grounds as the composition of the grand and petit juries (*ibid.*), governmental misconduct (J.A. 64), abuse of the grand jury process (J.A. 72), and burdensomeness of the litigation (*ibid.*).

half years of pretrial delay in this case (from indictment to the time of the district court's speedy trial dismissal) are attributable to appeals taken by the government from orders erroneously dismissing the indictment and suppressing evidence, an unsuccessful interlocutory appeal taken by three of the respondents from the denial of their motion to dismiss, and respondents' unsuccessful petitions for rehearing and certiorari. Respondents have now—in what we regard as the ultimate irony—been rewarded with a ruling by the court of appeals that their constitutional right to a speedy trial was violated by the appellate litigation growing out of their various legally erroneous claims.

The court of appeals has seriously erred in applying the standards established by this Court for assessing claims under the Speedy Trial Clause and in so doing has adopted a particularly harmful rule for treating pretrial appeal time under the Sixth Amendment. Under the rule advocated by respondents and applied by the court of appeals, virtually every pretrial appeal by the government or by a defendant potentially will violate the Constitution and will require the courts to engage in the full-blown, ad hoc balancing test necessary to adjudicate colorable Sixth Amendment claims. Such a rule offers only the prospects of unnecessary litigation leading to further delays and the windfall of a dismissal of charges with prejudice to a defendant who in all likelihood desires not a speedy trial but merely to manipulate the system to his own advantage. Nothing in the Speedy Trial Clause or in this Court's prior decisions requires such an untoward result. To the contrary, the concerns underlying the constitutional guarantee of a speedy trial, as set forth by the Court,

require that pretrial appeal time be excluded from the Sixth Amendment analysis.

In *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court established a balancing test to evaluate claims under the Speedy Trial Clause. The Court identified (407 U.S. at 530; footnote omitted) four relevant factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." The Court arrived at this flexible approach in recognition of certain fundamental differences between the right to a speedy trial and other constitutional rights that protect criminal defendants (*id.* at 519). First, "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused" (*ibid.*). Prompt trials and punishments serve deterrent and rehabilitative goals and diminish defendants' opportunities to negotiate guilty pleas to significantly reduced charges or otherwise take advantage of backlogs and large caseloads. These and other concerns make it important to society, sometimes more so than to defendants, that the accused be expeditiously brought to trial (*id.* at 519-521).

Second, delay, which is of course "not an uncommon defense tactic," "may work to the accused's advantage" (407 U.S. at 521).[11] With the passage of

[11] As Congress noted (S. Rep. 93-1021, 93d Cong., 2d Sess. 14 (1974)) in passing the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*:

> Only very rarely is it in the defendant's interest to seek a speedy trial, for in most cases that is the last thing he wants. Most defendants realize that delay inures to their benefit while speedy trial may mean speedy incarceration of the guilty.

time, the prosecution may find it more difficult to carry its burden of proof or more worthwhile to use its limited resources on cases of more immediate concern. Thus, unlike violations of other constitutional rights, infringement of the right to a speedy trial does not inherently prejudice a defendant's case (*ibid.*).

Finally, the Court stressed (407 U.S. at 521; footnote omitted) the amorphous quality of the speedy trial guarantee: "It is * * * impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." Accordingly, a "functional analysis" (*id.* at 522) is required, taking into account the "particular context" (*ibid.*) in which the delay has occurred. In this regard, the Court reiterated its prior observation that " 'the ordinary procedures for criminal prosecution are designed to move at a deliberate pace' " (*id.* at 521 n.15, quoting *United States* v. *Ewell*, 383 U.S. 116, 120 (1966)). And the Court emphasized the necessity to interpret the Speedy Trial Clause in light of society's interests, not just the defendant's:

> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."

Id. at 522, quoting *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905); see also *United States* v. *Ewell*, 383 U.S. at 120.

While the court of appeals purported to apply the balancing test set forth in *Barker*, it did so blindly, failing to take account of the principles on which this

Court relied as the basis for the test itself. The court of appeals' fundamental error lies in its failure to exclude the time attributable to pretrial appeals from the length of delay relevant under the *Barker* test. But the court of appeals also erred in its analysis of each of the other factors to be considered, as well as in its balancing of all of the circumstances. This case, notwithstanding the significant time that has passed, presents a compelling record against a finding that respondents' speedy trial right has been violated. The court of appeals' dismissal of the indictment in this case is "a distortion and abuse of the right to a speedy trial." *United States* v. *Litton Systems, Inc.*, 722 F.2d 264, 272 (5th Cir. 1984), cert. denied, No. 83-1550 (May 14, 1984).

A. Time Consumed By Pretrial Appeals Should Not Be Included In The Computation Of The Length Of Delay Relevant Under The Speedy Trial Clause

1. a. In the Speedy Trial Act (18 U.S.C. 3161 *et seq.*), Congress sought "to make effective the sixth amendment right to a speedy trial." S. Rep. 93-1021, 93d Cong., 2d Sess. 1 (1974). Thus, although compliance with the Act is not dispositive (see 18 U.S.C. 3173), " 'it will be an unusual case in which the time limits of the Speedy Trial Act have been met but the sixth amendment right to a speedy trial has been violated.' " *United States* v. *Saintil*, 705 F.2d 415, 418 (11th Cir.), cert. denied, 464 U.S. 855 (1983), quoting *United States* v. *Nance*, 666 F.2d 353, 361 (9th Cir.), cert. denied, 456 U.S. 918 (1982).

Congress determined in the Act that delay from interlocutory appeals and from appeals of indictment dismissals should be entirely excluded in calculating the relevant length of delay for bringing a defendant to trial. 18 U.S.C. 3161(d)(2) and (h)(1)(E); see

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United States v. *Hernandez*, 724 F.2d 904, 906-907 (11th Cir. 1984); *United States* v. *McGrath*, 613 F.2d 361, 366 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980). In referring to delays for proceedings concerning the defendant, of which interlocutory appeals are a part, Congress stressed that "it would indeed be anomalous to permit the defendant to benefit from delay proper[l]y undertaken to protect his interests in a fair adjudication of the charges against him by allowing dismissal without exclusion of that time." S. Rep. 96-212, 96th Cong., 1st Sess. 9 (1979); see also H.R. Rep. 93-1508, 93d Cong., 2d Sess. 34 (1974) ("a defendant should not profit doubly from delay he is responsible for").

b. These concerns—which echo those expressed more generally by the Court in *Barker* (see pages 17-18, *supra*)—apply equally under the Speedy Trial Clause. Pretrial appellate proceedings typically arise out of defense motions to dismiss indictments or to suppress evidence. Such motions, which invoke "the many procedural safeguards provided an accused" (*United States* v. *Ewell*, 383 U.S. at 120, quoted in *Barker* v. *Wingo*, 407 U.S. at 521 n.15), necessarily contemplate a measure of delay in their resolution at the trial court level. Indeed, the rule is that time spent in connection with the trial court's consideration of defense motions does not give rise to a Sixth Amendment violation:

> Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon.

United States v. *Auerbach*, 420 F.2d 921, 924 (5th Cir.), reh'g denied, 423 F.2d 676 (1969), cert. denied, 399 U.S. 905 (1970); see also, *e.g.*, *United States* v. *Litton Systems, Inc.*, 722 F.2d at 270; *Scarbrough* v. *State*, 76 Wis. 2d 87, 250 N.W.2d 354, 360-361 (1977); cf. 18 U.S.C. 3161(h)(1)(F).

The same principle should apply with even greater force on appeal. Where defense motions are successful although possibly erroneous, society's interest in the fair and accurate resolution of criminal charges may dictate that the government be permitted to appeal; such appeals, because of the constraints imposed by the Double Jeopardy Clause, must take place prior to trial. Because these proceedings have as their purpose the protection of vital interests of both the defendant and society and because they have been set in motion by the defense, the Speedy Trial Clause should be, as the Speedy Trial Act is, tolled during their pendency. See *United States* v. *Jackson*, 508 F.2d 1001, 1004 (7th Cir. 1975) ("In calculating the length of delay, * * * the period of delay attributable to review of an order appealable under 18 U.S.C. § 3731 should not be considered."); *United States* v. *Bishton*, 463 F.2d 887, 890 (D.C. Cir. 1972); *United States* v. *Herman*, 576 F.2d 1139, 1146 (5th Cir. 1978).[12] Respondents caused most of

[12] See also *United States* v. *Litton Systems, Inc.*, 557 F. Supp. 568, 571 (S.D. Miss. 1983), rev'd on other grounds, 722 F.2d 264 (5th Cir. 1984), cert. denied, No. 83-1550 (May 14, 1984); *United States* v. *Sebastian*, 428 F. Supp. 967, 975 (W.D.N.Y.), aff'd, 562 F.2d 211 (2d Cir. 1977); *State* v. *Helenbolt*, 334 N.W.2d 400, 405 (Minn. 1983); see generally *Barber* v. *Scully*, 731 F.2d 1073, 1074 (2d Cir. 1984) (delay caused by defendant's proceeding to prevent state from taking hair sample not chargeable to prosecution); *United States* v. *DiMuro*, 540 F.2d 503, 516 (1st Cir. 1976) (18 month delay pending Supreme Court's decision in another case on controlling legal issue did not violate the Sixth

the delay in this case by filing legally erroneous motions. Having set the judicial process in motion, they should not now reap the windfall of a dismissal under the Speedy Trial Clause predicated on the resultant delay. See *United States* v. *Jones*, 524 F.2d 834, 852 (D.C. Cir. 1975) (defendant must share responsibility for delays caused by consideration of his own pretrial motions); *Torres* v. *Florida*, 477 F.2d 555, 556 (5th Cir. 1973) ("It would be extremely difficult to charge the state with failure to try an accused while the accused is himself seeking a writ to prohibit such a trial."); cf. *INS* v. *Rios-Pineda*, No. 83-2032 (May 13, 1985), slip op. 5-6 (time accrued during appeals of immigration orders did not count toward seven years of residency required to be eligible for suspension of deportation).

Including appeal time within the length of delay under the Speedy Trial Clause is especially inappropriate where, as here, the government has been successful on appeal. Having induced the trial court to err, respondents are in a poor position indeed to claim that their constitutional rights have been violated by the time needed for the government to obtain correct legal rulings from the court of appeals. If this time is to be included at all, it should be weighed against respondents. See *United States* v. *Brown*, 520 F.2d

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Amendment). But see *Atkins* v. *Michigan*, 644 F.2d 543, 548 (6th Cir.), cert. denied, 452 U.S. 964 (1981) (defendant incarcerated during appeal); *United States* v. *Brown*, 520 F.2d 1106, 1109 (D.C. Cir. 1975) (defendant incarcerated during part of delay and considerable unjustified delay in trial court); *Chism* v. *Koehler*, 392 F. Supp. 659 (W.D. Mich. 1975), aff'd on opinion below, 527 F.2d 612 (6th Cir.), cert. denied, 425 U.S. 944 (1976) (defendant incarcerated during appeal); *Day* v. *United States*, 390 A.2d 957 (D.C. 1978) (appeal not expedited).

1106, 1130-1131 (D.C. Cir. 1975) (MacKinnon, J., dissenting from denial of rehearing en banc). As the court stated in *People* v. *Jamerson*, 198 Colo. 92, 97, 596 P.2d 764, 768 (1979):

> Defendant's original motion to dismiss was not legally sustainable * * *. He cannot now use the fact that a trial court erroneously upheld his position to predicate an argument that an unreasonable delay took place because the prosecution appealed and obtained a reversal of the erroneous ruling.

See also *State* v. *Sieckmann*, 3 Or. App. 454, 459-460, 474 P.2d 367, 370 (1970) ("[s]ince defendant's motion to dismiss the original indictment was without merit, * * * and the resulting erroneous order of dismissal was the cause of the state's appeal, the defendant must share responsibility for the delay"); *State* v. *White*, 118 Ariz. 47, 56, 574 P.2d 840, 849 (Ct. App. 1977) (defendant's motion "is made in the context of the possibility of an appeal by the State if it is granted").[13]

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[13] We do not mean to suggest that appellate delay may never violate a defendant's constitutional rights. Where the government has intentionally sought delay to obtain an advantage that undermines the fundamental fairness of the proceeding, due process concerns would be raised. See *United States* v. *Lovasco*, 431 U.S. 783 (1977); *United States* v. *Marion*, 404 U.S. 307 (1971). Indeed, in an extreme case, the values underlying the Speedy Trial Clause might be so plainly implicated that appellate time could result in a Sixth Amendment violation. Such a result might obtain where a defendant who is incarcerated pending an appeal by the government from an order suppressing material but not crucial evidence is unable, despite clearly expressed and sincere requests presented to the court of appeals, to obtain a decision from that court within a time period that is reasonable in light of the

2. a. The conclusion that pretrial appeal time must be excluded under the Speedy Trial Clause is reinforced by considering the importance of the government's right to appeal and the different nature of appellate proceedings from those in the trial court. The time attributable to government appeals from pretrial orders cannot be subjected to the strictures of the Speedy Trial Clause without severely impairing the government's right to appeal under 18 U.S.C.

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issues presented on the appeal. Cf. *United States* v. *Herman*, 576 F.2d at 1146.

In fashioning an exception to the general rule of exclusion of appellate time, the defendant's ability to preserve his claims for post-conviction review must be kept in view. Where a defendant sincerely desires to go to trial, it may often be appropriate to ask that rulings on any motions to dismiss the indictment or to suppress evidence be deferred until after trial, thus obviating the need for the government to take an interlocutory appeal. See generally *United States* v. *Scott*, 437 U.S. 82, 100 n.15 (1978); *United States* v. *Ceccolini*, 435 U.S. 268, 271 (1978). Even where a defendant seeks and obtains a favorable ruling before trial and an ensuing appeal remains under advisement for an inordinately long period, the defendant may still be able to secure a speedy trial by entering into a stipulation to withdraw his claim until after trial.

Respondents obviously cannot take advantage of any exception in this case, for they were not incarcerated and failed to assert in the court of appeals any right to a speedy trial while the appeals were pending. Moreover, the length of time consumed by the court of appeals in deciding the first two appeals, while considerable, may not have been wholly unreasonable in view of the complexity of the issues, necessitating several lengthy opinions, the grant of en banc review, a remand to the district court for further factfinding, and the delay that may have been occasioned while awaiting this Court's decision in *United States* v. *Hollywood Motor Car Co.*, *supra*, which was dispositive of the second appeal.

3731 [14] and creating substantial practical difficulties. The government has a vital interest in securing appellate review of district court orders dismissing indictments or suppressing evidence, a concern of "public justice" (*United States* v. *Ewell*, 383 U.S. at 120) that may not be ignored under the Speedy Trial Clause (see page 18, *supra*). Because of double jeopardy considerations, such review can, of course, take place only prior to trial. Yet the "deliberate pace" (*Ewell*, 383 U.S. at 120) of the criminal process is, with good reason, especially unhurried at the appellate stage. See *United States* v. *Bishton*, 463 F.2d at 890 ("the function of appellate courts necessarily casts the delay attendant upon their deliberations in a somewhat different light"); see also *Harrison* v. *United States*, 392 U.S. 219, 221-222 n.4 (1968) (delays on appeal resulted from "the need to assure careful review of an unusually complex case").

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[14] 18 U.S.C. 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence * * *, not made after the defendant has been put in jeopardy * * *, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases * * * shall be diligently prosecuted.

It would therefore make little sense to require that the appellate process proceed with the speed required of trial courts by the Sixth Amendment. Cf. *Doescher* v. *Estelle*, 454 F. Supp. 943, 949-950 (N.D. Tex. 1978) (no Sixth Amendment right to a speedy appeal). The rule adopted by the court below could force the government to seek writs of mandamus from this Court to compel the courts of appeals to issue decisions once cases have been pending on appeal for a significant period (although when an undue period would be about to elapse would be purely a matter of conjecture). This unhappy and impractical result is hardly required, as the court below apparently believed (Pet. App. 13a), by this Court's reference in *Barker* v. *Wingo* (407 U.S. at 531) to delay caused by "overcrowded courts." Taken in context, that statement plainly referred to trial court congestion and not to delay on appeal, where more time is spent reviewing legal issues than in waiting for a hearing date on a crowded calendar. Moreover, the Ninth Circuit overlooked a critical distinction in equating its own delays with delays due to trial court congestion—the latter are caused by circumstances beyond a defendant's control, whereas the appeals here were necessitated entirely by the need to review respondents' legally erroneous contentions in order to ensure due protection of their rights. In sum, where the government has, in good faith, taken an appeal under 18 U.S.C. 3731, the resulting delay should be excluded under the Speedy Trial Clause.[15] See generally *United States ex rel. Mitchell* v. *Fairman*, 750 F.2d 806, 808-809 (7th Cir. 1984) (22 months on appeal of suppression order not weighed against the state because "the state had every right to appeal" and "the appeal was not taken just for purposes of delay").

[15] The court of appeals faulted the government for refusing to go to trial on the firearms counts during the pendency of the appeal of the district court's order suppressing evidence of the dynamite (Pet. App. 12a; see page 5, *supra*). But the government acted in good faith, and surely had no reason to anticipate that the court of appeals would take over three years to decide the appeal. While the suppressed evidence was not as critical to the firearms counts as it was to the dynamite counts, it was still quite material to proving that all respondents were engaged in a joint activity and that those respondents traveling in the station wagon had constructive possession of the firearms found in the motor home. Moreover, the firearms counts had not been severed from the dynamite counts—without a severance, the government would have had to go to trial on all counts, thereby losing its right to appeal the suppression order with respect to the dynamite counts as well. Cf. 18 U.S.C. 3161(h)(7) (exclusion of time under the Speedy Trial Act where defendants are joined for trial and no severance motion has been granted). Accordingly, the time on appeal cannot weigh against the government, especially where the government was successful in reversing the district court's dismissal with prejudice. See generally *United States* v. *Saintil*, 705 F.2d at 418 (where government made a good faith mistake in interpreting district court's order, the delay attributable to its appeal should not be weighed heavily); *Jones* v. *Commonwealth*, 495 Pa. 490, 434 A.2d 1197 (1981) (delay attributable to prosecution's unsuccessful interlocutory appeal did not violate speedy trial guarantee). Even if the period on the first appeal should be included with respect to the firearms counts, there is absolutely no reason to include that period with respect to the dynamite counts, where the government's appeal was concededly necessary because crucial evidence had been suppressed (Pet. App. 12a-13a).

b. Other policy concerns also counsel in favor of excluding pretrial appeal time under the Speedy Trial Clause. In explaining the appropriate treatment of

the length of delay under the Speedy Trial Clause, the Court in *Barker* described (407 U.S. at 530) this factor as a kind of "triggering mechanism." Once the delay has become "presumptively prejudicial" (*ibid.*), a court must go on to evaluate and balance all of the relevant considerations. While the amount of delay that may be tolerated without triggering the full *Barker* balancing analysis varies with such circumstances as the seriousness of the charged offense (*id.* at 530-531), the courts of appeals have regularly considered delays of from six to 18 months sufficiently troubling to provoke application of the complete balancing test. See, *e.g.*, *United States ex rel. Fitzgerald* v. *Jordan*, 747 F.2d 1120, 1127 (7th Cir. 1984) (eight months); *United States* v. *Jenkins*, 701 F.2d 850, 856 (10th Cir. 1983) (16 months); *Cain* v. *Smith*, 686 F.2d 374, 381 (6th Cir. 1982) (11 and one-half months); *Isaac* v. *Perrin*, 659 F.2d 279, 282 (1st Cir. 1981) (ten months); *United States* v. *Avalos*, 541 F.2d 1100, 1111 (5th Cir. 1976), cert. denied, 430 U.S. 970 (1977) (15 months); *United States* v. *Simmons*, 536 F.2d 827, 831 (9th Cir.), cert. denied, 429 U.S. 854 (1976) (six months); cf. *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555, 565 (1983) (18 months sufficient to trigger further balancing where *Barker* test was applied to assess delay in returning property under the Due Process Clause).

It is not uncommon, however, for a single pretrial appeal to consume a year or more from the time of the district court's decision until return of the court of appeals' mandate, and indeed sometimes much

more than that.[16] The rule adopted by the court of appeals in this case thus would turn virtually every prosecution necessitating a pretrial appeal into a presumptive Sixth Amendment violation, requiring a complete analysis and balancing of the *Barker* factors. Such a result makes very little sense indeed. From a flexible guarantee of both defendants' and society's right to a speedy trial, the court of appeals has fashioned a rule that will operate to inhibit substantially the effective correction on appeal of error below.[17]

This Court has concluded that the "sound administration of justice" precludes an interpretation of the Double Jeopardy Clause that would impose the "high price * * * [on] society" of granting "immunity from [retrial] because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, 377 U.S. 463, 466

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[16] This is especially true where the issues are important or difficult, as they often are in cases where the Solicitor General has authorized an appeal. See, *e.g.*, *United States* v. *Accardo*, 749 F.2d 1477 (11th Cir. 1985), reh'g pending, No. 82-5380 (three years); *United States* v. *Morgan*, 743 F.2d 1158 (6th Cir. 1984), cert. denied, No. 84-1357 (Apr. 22, 1985) (two years); *United States* v. *Thompson*, 710 F.2d 1500 (11th Cir. 1983), cert. denied, 464 U.S. 1050 (1984) (three years); *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983) (two years); *United States* v. *DiBernardo*, 552 F. Supp. 1315 (S.D. Fla. 1982), appeal pending, No. 83-5295 (11th Cir.) (two years).

[17] Records maintained in the Office of the Solicitor General indicate that the federal government takes an average of about 90 pretrial appeals in criminal cases each year and that it completely or partially prevails in about three-quarters of such appeals.

(1964).[18] The same is true of the Speedy Trial Clause—the threat of indictment dismissals, carrying with it the curtailment of the government's opportunities to seek correction of reversible error, is too high a price to achieve the goal of expediting the appellate process. Were it otherwise, defendants would be able to obtain through the Speedy Trial Clause the very immunity from correction of error that they are denied under the Double Jeopardy Clause. As the Court observed in *United States* v. *Ewell*, 383 U.S. at 121:

> It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events. * * * [This rule] has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilant to strike down previous convictions that are tainted with reversible error. These policies, so carefully preserved in this Court's interpretation of the Double Jeopardy Clause, would be seriously undercut by [an] interpretation of the Speedy Trial Clause [that raised a Sixth Amendment obstacle to retrial following successful attack on a conviction].

[18] See also *United States* v. *Jorn*, 400 U.S. 470, 480 (1971) (opinion of Harlan, J.) (in view of "the scheduling problems arising from case overloads, and the Sixth Amendment's requirement that the single trial to which the double jeopardy provision restricts the Government be conducted speedily, it becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide").

c. If undue appellate delay were a serious and systemic problem (and neither the court below nor respondents have shown that it is), the most effective tool for its amelioration would be legislation or judicial rulemaking, not constitutional adjudication. As Congress stated in passing the Speedy Trial Act (S. Rep. 93-1021, *supra*, at 15), "[q]uite clearly, the [constitutional] case-by-case approach cannot, and should not be expected to solve the problem of court delays." Cf. *Baker* v. *Wingo*, 407 U.S. at 523 (Court has no constitutional basis for requiring trial within specified time period). Should Congress find that appellate delay does present significant problems for the criminal justice system, it is free to modify the Speedy Trial Act to include, rather than exclude, appeal time or to pass a separate "Speedy Appeal Act." Indeed, Congress already requires appeals in certain contempt proceedings to be decided within 30 days (28 U.S.C. 1826(b)). Alternatively, the courts of appeals could adopt their own local rules for the speedy disposition of appeals. Cf. *Barker*, 407 U.S. at 523, 530 n.29 (courts of appeals may adopt local speedy trial requirements); *Abney* v. *United States*, 431 U.S. 651, 662 n.8 (1977) (courts of appeals may cope with delay resulting from permissible interlocutory defense appeals "by rules or policies giving such appeals expedited treatment" and by "establish[ing] summary procedures * * * to weed out frivolous claims"). These approaches would far more effectively and sensibly address appellate delay than would a necessarily ad hoc constitutional approach that penalizes the prosecution and grants windfalls to defendants without addressing the underlying causes

of delay or providing a mechanism for overcoming them.[19]

3. A further reason for excluding pretrial appeal time in this case lies in the rule established by this Court in *United States* v. *MacDonald*, 456 U.S. 1 (1982): where an indictment has been dismissed and the defendant is not subject to actual restraints on his liberty, the Speedy Trial Clause does not apply. In *MacDonald*, the Court held that the Speedy Trial Clause did not apply to the period between the government's dismissal of charges and the defendant's indictment more than four years later. "Once charges are dismissed," the Court held, "the speedy trial guarantee is no longer applicable" (456 U.S. at 8; footnote omitted). This rule applies here to exclude the time on the government's appeals: no charges were outstanding against respondents during these periods, for the indictment had been dismissed by the district court, and respondents were unconditionally released during the appeals.[20] The government could not have tried respondents during these periods no matter how dearly it wanted to do so. See *Arnold* v. *McCarthy*, 566 F.2d 1377, 1383 (9th Cir. 1978) (following dismissal of indictment, defendant was not an "accused" who could demand a speedy trial); *Smith* v. *Colman*, 528 F.2d 1362, 1364 (5th Cir. 1976); cf.

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[19] Moreover, the Due Process Clause remains an appropriate constitutional protection against invidious appellate delay.

[20] The periods that should be excluded on this ground extend from May 12, 1976, when the indictment was dismissed as to all respondents, until the superseding indictment was returned on June 18, 1980, and, as to KaMook Banks, from August 8, 1980, when the superseding indictment against her was dismissed, until January 31, 1983, when the court of appeals' mandate issued.

Klopfer v. *North Carolina*, 386 U.S. 213 (1967) (speedy trial guarantee applied where indictment was not discharged and case could be restored to docket on prosecutor's request). Hence, the Speedy Trial Clause does not apply.[21] Respondents' claim should have been analyzed instead under the Due Process Clause. See *MacDonald*, 456 U.S. at 7; *United States* v. *Lovasco*, 431 U.S. 783 (1977); pages 43-44 note 26, *infra*.

The court below erred in distinguishing *MacDonald* on the ground that the government's dismissal of charges there was voluntary, while here the indictment was dismissed over the government's objection (Pet. App. 8a-9a). This Court's reasoning in *MacDonald* is fully applicable to the circumstances of this case (456 U.S. at 8-9):[22]

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[21] The *MacDonald* rule does not apply, of course, where a formal indictment remains outstanding or a defendant is actually under arrest or other restrictions and thus is still being held to answer criminal charges. See *MacDonald*, 456 U.S. at 6-9; *Dillingham* v. *United States*, 423 U.S. 64 (1975); *United States* v. *Marion*, 404 U.S. at 320-321. Accordingly, where the government appeals from an order that does not dismiss the indictment (such as an order suppressing evidence) or where a defendant is incarcerated or otherwise held to answer pending appeal, the rule established by *MacDonald* would not be controlling.

[22] It is incorrect to characterize the Army's decision not to court-martial MacDonald as a voluntary dismissal by the prosecution. The decision was reached after an adversary proceeding under Article 32 of the Uniform Code of Military Justice at which Army prosecutors urged that charges be preferred and MacDonald prevailed in his contention that there was insufficient basis for trial of the charges against him. See 456 U.S. at 4-5, 10 n.11. In any event, the Court nowhere suggested that its holding might be limited to voluntary dismissals. Indeed, the Court indicated its intent that the holding apply to all dismissals, including those

The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

Once charges are dismissed, * * * the formerly accused is, at most, in the same position as any other subject of a criminal investigation. Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life. This is true whether or not charges have been filed and then dismissed. * * * But with no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. * * * Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.

There were no live indictments outstanding against respondents during the government's appeals, and respondents were not subject to any restraints on their liberty. The government's appeals exposed respondents to the same "public obloquy, stress and

entered over the government's objection. The Court stated (456 U.S. at 7 n.7) that its "holding agrees with the determination made by Congress in enacting the Speedy Trial Act of 1974 * * * that if charges are initially dismissed and later reinstated, the period between the dismissal and the reinstatement is not to be included in computing the time within which a trial must commence. 18 U.S.C. §§ 3161(d), 3161(h)(6)." Section 3161(d) expressly applies to dismissals on the motion of a defendant, where an indictment dismissed by the district court is reinstated following appeal or new charges are brought based on the same conduct.

anxiety" that would have been caused by any public knowledge of the government's interest in or consideration of criminal charges against them. Even where it is clear that the government intends to reindict or otherwise to pursue the case, the Speedy Trial Clause does not apply. See *United States ex rel. Mitchell* v. *Fairman*, 750 F.2d at 808 (Speedy Trial Clause not applicable to period between time when grand jury returned "no bill" and time when another grand jury indicted defendant); *United States* v. *Samples*, 713 F.2d 298, 301-302 (7th Cir. 1983) (Speedy Trial Clause not applicable to period between dismissal of indictment for improper venue and reindictment). Simply put, if there are no pending charges that can be tried, the Sixth Amendment does not require the impossibility of trying them speedily.

In sum, even if the delay attendant upon some interlocutory appeals, such as of suppression orders, were properly subject to evaluation under the Speedy Trial Clause, the Clause has no application here, where no charges were pending against the defendants during the pendency of the appeals.

4. The time consumed by a *defendant's* pretrial appeals must be excluded under the Speedy Trial Clause for many of the same reasons already discussed with reference to government appeals. Delay caused by defendants in their own appeals plainly cannot later be used by them to support a dismissal on Sixth Amendment grounds. As the court reasoned in *Hill* v. *Wainwright*, 617 F.2d 375, 377 (5th Cir. 1980) (emphasis in original), such delay is "occasioned by [the defendant's] own pleadings and reiterated appellate petitions insisting, not that he be tried, but that he be *not* tried and that instead the charges be dismissed." The appropriate rule was stated by the court in *Esperti* v. *Wainwright*, 447 F. Supp.

1289, 1294-1295 (M.D. Fla. 1978): while a defendant does "not waive his speedy trial claim by seeking appellate relief prior to trial, * * * the delay therefrom does not increase any accrued delay." See also *Harrison* v. *United States*, 392 U.S at 221-222 n.4 (defendant's claim that he had been denied a speedy trial by lengthy delays on successful appeals he had taken from earlier convictions was "wholly without merit"); *United States* v. *Bizzard*, 674 F.2d 1382, 1386 (11th Cir.), cert. denied, 459 U.S. 973 (1982); *United States* v. *Hill*, 622 F.2d 900, 909 (5th Cir. 1980); *Dandridge* v. *United States*, 265 F.2d 349, 350 (D.C. Cir. 1959); *In re Williams*, 393 N.E.2d 353 (Mass. 1979). The court of appeals thus clearly erred in failing to exclude from the length of delay the more than two years attributable to the interlocutory appeal taken by respondents (other than KaMook Banks) of the district court's denial of their motion to dismiss for vindictive prosecution.[23]

B. Even If Time On Appeal May Be Included Within The Length Of Delay, It Should Ordinarily Be Excused Or Counted Against The Defendant When The Reasons For The Delay Are Considered

We have argued above that the time consumed by appellate review of rulings on defense motions should simply be automatically excluded from the length of delay relevant under the first factor of this Court's

[23] Although the court of appeals purported not to weigh this time against the government (Pet. App. 15a), it did count the time within the length of delay, to which the court gave virtually dispositive force (see *id.* at 17a). The time spent on the appeal before the court of appeals should have been counted against respondents or, at a minimum, entirely excused, as was the time attributable to respondents' frivolous certiorari petition following the dismissal of their appeal for want of jurisdiction under *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982).

four-part *Barker* v. *Wingo* balancing test, as Congress has decreed in the Speedy Trial Act. An alternative approach that may, if properly applied, lead to acceptable results is to count this time as part of the delay, while ordinarily excusing it entirely or else, in appropriate circumstances, counting it against defendants when considering the second factor set forth in *Barker*, the reasons for the delay.[24]

Although this approach may at first blush seem in some sense more intellectually satisfying than not including pretrial appeal time as part of the relevant delay at all, it suffers from several flaws that diminish both its usefulness and its coherence. In the first place, it would turn virtually every pretrial appeal into a presumptive speedy trial violation (see pages 28-29, *supra*). Not only would such a result defy logic, it would increase the burdens on the courts, thereby contributing to further delays, by requiring them routinely to engage in the complete ad hoc *Barker* balancing test. Moreover, an undue emphasis on the length of delay could lead to errors in the balancing such as that committed by the courts below in this case.

More fundamentally, the prescribed balancing would in the vast majority of cases simply be an

[24] The time spent on pretrial *defense* appeals, for example, should be weighed against defendants, especially where, as here, the issue on which they appealed may be reviewed following conviction. The approaches followed by the lower courts in excusing time or weighing it against a party have not been entirely consistent. By excusing a time period, we mean that it should be subtracted from the relevant length of delay. By weighing a time period against a defendant, we mean not only that the period should be subtracted from the length of delay, but also that the defendant's burden of demonstrating a constitutional violation should be increased, as it is when he fails to seek a speedy trial in the first place.

exercise in futility. If the reasons for the delay are accurately considered, appellate delay will virtually never violate the Speedy Trial Clause. The result thus will be the same as if the time had simply never been included at all. That being so, there is no point to requiring the full balancing test every time an appeal is taken. As the court stated in *United States* v. *Mann*, 291 F. Supp. 268, 274 (S.D.N.Y. 1968), in discussing the demand-waiver rule:

> If [the failure to demand a prompt trial] alone could be decisive in every case, it would be at least a needlessly lavish use of judicial energies to bypass it and work through a detailed appraisal of all the other circumstances as grounds for decision.

Since the rule we advocate admits of an exception in egregious cases (see pages 23-24 note 13, *supra*), there is no need to require the full balancing test in all circumstances merely to leave open the possibility of such an exception in those rare instances where its application might be appropriate.

Contrary to respondents' contention (Br. in Opp. 29), the exclusion of appeal time is consistent with the balancing approach set forth in *Barker*. The reasons that we have set forth in support of a general exclusion of appellate delay are the very ones on which we would rely in any particular case to excuse the delay as part of the *Barker* balancing test. It would be more efficient, and lead to far greater regularity of results, for the Court, after considering all of the relevant factors, to conclude that the balance tips so clearly in favor of excusing appellate delay that it should simply be excluded from the analysis altogether.[25]

[25] The alternative case-by-case approach would indeed require "a needlessly lavish use of judicial energies" (*Mann*, 291 F. Supp. at 274). One student commentator has suggested a four-factor balancing test merely to evaluate the reasons for appellate delay; the result of this difficult test would itself then become but a single factor in another four-factor balance, the one prescribed by *Barker* v. *Wingo*. See Note, *The Sixth Amendment Speedy Trial Guarantee: Delay Resulting From Interlocutory Appeals*, 60 B.U. L. Rev. 664 (1980); see also *United States* v. *Herman*, 576 F.2d at 1146 ("at least three factors" must be considered in assessing reasons for appellate delay). We submit that nothing in the Speedy Trial Clause justifies such an elaborate undertaking.

C. Even If The Delay In This Case Is Counted And Weighed Against The Government, The Absence Of Prejudice To Respondents And Their Failure To Assert Their Right To A Speedy Trial Demonstrate That No Sixth Amendment Violation Occurred

Although the length of delay is but one of four relevant factors, the court of appeals gave almost conclusive weight to it (Pet. App. 17a). We have argued above that a substantial portion of the delay in this case—75 out of a total of 90 months—should simply be excluded altogether from the speedy trial analysis or else excused or weighed against respondents; but even if it is included and weighed against the government, its significance must be substantially discounted by consideration of the other two factors, prejudice and assertion of the right to a speedy trial (*Barker*, 407 U.S. at 531-533).

1. Prejudice to respondents is almost entirely absent here. In view of the fact that respondents "were incarcerated only for short periods, and were released without restriction during almost all of the period of delay" (Pet. App. 16a), the court below was able to conclude only that respondents had suffered "some" personal prejudice (*ibid.*). The court's conclusion (*id.* at 16a-17a) that respondents had suf-

fered prejudice to their defense by the deaths and fading memories of witnesses is wholly speculative and ignores the simplicity of the underlying facts in this case. Respondents were apprehended in the very act of committing the crimes with which they were charged and in possession of the principal items of evidence that would be used to prove the government's case. Whatever prejudice has been caused by the passage of time has been to the government's detriment, not respondents'.

Even if there were some possibility of meaningful prejudice to the ability to mount an effective defense, that is an assessment that can be reliably made only after trial. See *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978) ("Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. * * * [P]rejudice can be better gauged" after trial.); *United States* v. *Litton Systems, Inc.*, 722 F.2d at 270-271. Not only would such an approach allow more informed inquiry into the degree of any prejudice suffered by respondents, it would also have saved substantial further amounts of time in bringing them to trial.

2. The final factor, and the one that conclusively demonstrates the absence of a constitutional violation here, is respondents' obvious desire to avoid trial. The Court emphasized the importance of a defendant's desire to obtain a speedy trial in *Barker* v. *Wingo* (407 U.S. at 532, 536):

> We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.
>
> * * * * *

> [B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates * * * that the defendant did not want a speedy trial.

This case presents just such a record. Cf. *Look* v. *Amaral*, 725 F.2d 4 (1st Cir. 1984) (31 month delay did not violate Speedy Trial Clause where defendant failed to inquire into status of case during that period).

a. The court of appeals' conclusion (Pet. App. 15a) that respondents had adequately asserted their right to a speedy trial is entirely untenable, and the factors on which the court relied in reaching its conclusion are insubstantial. The court pointed first (*ibid.*) to respondents' expressed desire to go to trial on May 12, 1976 (see J.A. 169). At that time, however, critical evidence against respondents had been erroneously suppressed and a trial would have defeated the government's right to appeal the suppression order. Moreover, the government had already clearly stated that it would not proceed to trial on that date because of the pending appeal (see page 5, *supra*), and respondents therefore knew that they would not be going to trial at that time. Their purely gratuitous and pro forma demands that the case proceed do not demonstrate an actual desire to go to trial and therefore are entitled to no weight. See, *e.g.*, *United States* v. *Jackson*, 508 F.2d at 1004; see also *Barker*, 407 U.S. at 529.

The court of appeals relied next (Pet. App. 15a) on respondents' motions to dismiss the indictment on speedy trial grounds following the first appeals. Through these motions, however, respondents did not seek a speedy trial. Rather, they sought—as they

have throughout the proceedings—to avoid trial. Finally, the court of appeals relied (*ibid.*) on respondents' objections to continuances following the last remand to the district court. These objections might be considered in evaluating subsequent delay in the district court (delay which thus far is not of constitutional dimension), but they do not indicate that respondents had adequately asserted their rights with respect to earlier periods. Evidence of respondents' belated desire to go to trial in 1983 cannot call into question the propriety of the time already consumed by the appeals.

b. It is obvious from the record that, far from seeking trial at the earliest possible date, respondents were from the very beginning doing everything in their power to delay facing a trial (where, in light of the strength of the government's case, they would have little chance of prevailing). In addition to filing a plethora of pretrial motions at the beginning of the case as well as after each remand (see page 15 note 10, *supra*), respondents sought and obtained two continuances of the trial date during 1976 and attempted to obtain a third (C.R. 36, 37, 39, 62, 64; see C.R. 139; see J.A. 41-43, 46), and again sought continuances following the court of appeals' remand in 1980 (see pages 5, 7, *supra*). Respondents also opposed or failed to join in the government's attempts to expedite the appeals (C.R. R-268, at 2 n.3; 8/12/80 Tr. 192-193). Had respondents wanted sincerely and effectively to assert their right to a speedy trial, they would have pressed the court of appeals to decide the case more expeditiously. Instead, they sat on their rights and bided their time, perhaps hoping that the appeals may have been overlooked or that the delay would ripen into a Sixth Amendment violation. Cf. *Look* v. *Amaral*, 725 F.2d at 6-8 (defendant apparently hoped that the state had forgotten about his case or that he would eventually obtain a dismissal on speedy trial grounds).

Most telling are respondents' petitions for rehearing and certiorari following the court of appeals' ruling in favor of the government as to KaMook Banks and dismissal of the other respondents' appeals on the vindictive prosecution claim. That respondents would continue to seek interlocutory appellate review following this Court's dispositive decision in *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (per curiam), holding that such relief is not available, irrefutably demonstrates respondents' manifest desire to avoid trial.

In sum, the court of appeals' affirmance of the dismissal of the indictment in this case for violation of the Sixth Amendment cannot be squared with any value underlying the Speedy Trial Clause. See generally *United States* v. *Litton Systems, Inc.*, 722 F.2d at 272 (to hold that defendant's speedy trial right had been violated "would be a distortion and abuse of the right to a speedy trial under the Sixth Amendment, which was never intended to protect those who do everything in their power to delay or defeat the holding of a trial as long as possible").[26]

---

[26] The district court also held that respondents' due process rights had been violated (Pet. App. 129a-130a n.7). Although the court of appeals did not reach this issue, in the interest of preventing further delay and because resolution of the issue is so clear, we submit that it would be appropriate for this Court to rule that there was no due process violation. The Due Process Clause protects the fundamental fairness of the proceeding; in this context, prejudice to the defense and the reasons for the delay are especially important. See *United States* v. *Lovasco*, 431 U.S. at 790, 796. Here, prejudice to

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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respondents was minimal at best, and most of the delay was caused by respondents' own pretrial motions and the resulting appeals. On these facts, the district court's ruling that respondents were entitled to dismissal of the indictment under the Due Process Clause is legally insupportable.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10239

Supreme Court, U.S.
FILED
JUL 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,
Petitioner,

v.

KENNETH MOSES LOUD HAWK, *et al.*,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a *per se* rule should be adopted allowing pretrial criminal appeals to consume a limitless amount of time, thereby insuring that even clearly inappropriate appellate delay cannot impact a defendant's right to a speedy trial.

2. Whether the Sixth Amendment's Speedy Trial Clause protects a defendant-appellee during a pretrial appeal pursued by the Government as part of its effort to try, convict and incarcerate that defendant.

3. Whether every time a suppression order is entered against the Government with respect to only part of a criminal case, the Government can contumaciously refuse to proceed to trial on the unaffected counts after being denied a stay by both the trial and appellate benches, and suffer no consequence under *Barker* v. *Wingo* for such recalcitrance.

4. Whether the appellate court erred in upholding the District Court's use of discretion in applying the analysis of *Barker* v. *Wingo* to the unique facts of this decade-old case and therein finding a clear speedy trial violation.

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The opinion of the Ninth Circuit Court of Appeals affirming the dismissal of the indictment for violation of respondents' Sixth Amendment right to a speedy trial (Pet. App. 1a-25a) is reported at 741 F.2d 1184 (1984). The opinion of the District Court (J. Redden) dismissing the indictment on speedy trial grounds (Pet. App. 119a-138a) is reported at 564 F.Supp. 691 (D.C. Or., 1983).

The Court of Appeal's opinion addressing respondents' and petitioner's respective "vindictive prosecution" appeals (Pet. App. 26a-35a) is reported at 682 F.2d 841 (1982). The District Court's Amended Order (J. Redden) on the vindictive prosecution claims (Pet. App. 139a-143a) is unreported (1980).

The *en banc* opinion of the Court of Appeals reversing the District Court's suppression order and remanding the case to the District Court (Pet. App. 36a-87a) is reported at 628 F.2d 1139 (1979). The panel opinion (Pet. App. 88a-118a) is unreported (1977). The District Court's (J. Belloni) bench ruling dismissing the indictment for unnecessary delay under F.R.Cr.P. 48(b) (Pet. App. 149a-151a, J.A. 169-170) and its suppression order (Pet. App. 152a-157a) are unreported (1976).

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was issued on August 30, 1984, and a petition for rehearing was denied on January 8, 1985. (The mandate issued January 16, 1985.) A petition for a writ of certiorari was filed on February 26, 1985, and was granted on April 15, 1985.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

This continuously prosecuted criminal case began on November 14, 1975. Respondents first demanded a speedy trial

months before this country's Bicentennial celebration. No trial has yet been held.

On November 13, 1975 the FBI issued a teletype describing two vehicles in which it believed unidentified federal fugitives were traveling. (RT 5/9/78 pps. 64-65) The next day a motor home matching that description was stopped in the eastern Oregon desert town of Ontario by Oregon State Trooper Griffiths. (RT 5/9/78, pps. 53-54) Inside were respondent KaMook Banks, former co-defendants Anna Mae Aquash and Leonard Peltier[1], and at least one other unknown person. (RT 5/9/78 pps. 56, 64; RT 6/23/80 p. 110)[2]

The Trooper approached the motor home, and asked all the occupants to step outside. Respondent KaMook Banks, her infant child, Peltier and Aquash emerged. Griffiths asked if anyone was still inside. He was told "no." At that same instant the vehicle sped forward. Peltier took the opportunity to jump over a fence and escape into the night. The motor home was later found a half mile down the highway with no one inside. (RT 6/23/80 pps. 110-111, 113)[3]

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[1] Leonard Peltier's case was severed from respondents', and subsequently dismissed on motion of petitioner. (CR R-186.J.A. 70) Anna Mae Aquash is deceased. (CR 129, J.A. 111)

[2] The record contains two transcripts dated June 23, 1980, each beginning at page 1. The one captioned "Transcript of Proceedings before the testimony of Sidney Rubin" will be referred to as "RT 6/23/80a."

In 1978, the District Court adopted a "new" numbering system. In effect, the numbering of documents was begun anew, with an "R" preceeding the document number. However, some documents from the mid 1970s are more easily referenced by using the old system that gave each page a separate number. These documents will be referred to by the notation "FCR" for "former clerk's record."

[3] Petitioner's theory is that Dennis Banks was the driver of the motor home. It bases this conclusion on the fact that his wife was in that vehicle, as was his briefcase, and that a few fingerprints alleged to be his were found on such items as a pickle jar. (RT 6/17/80. p. 49)

As Trooper Griffiths was stopping the motor home, a white station wagon pulled off the highway and parked a distance back from the larger vehicle. Respondents Kenneth Moses Loud Hawk and Russ James Redner, the occupants of that vehicle, were arrested and taken to the city jail with Ms. Banks and Ms. Aquash. (RT 5/9/78 p. 86)

The vehicles were searched pursuant to state and federal search warrants. Found fully secreted in various parts of the motor home were blasting caps, pocket watches, and eight firearms which allegedly had their serial numbers obliterated. (CR R-160, J.A. 69; RT 6/17/80, pps. 81-82) A search of the station wagon produced a quantity of a substance which the Government contends was dynamite. This evidence was subsequently destroyed by state officials, despite the fact that it could easily have been stored in nearby magazines.[4]

All respondents were indicted on November 25, 1975 and charged with possessing explosives and firearms. (CR 1, J.A. 38) Trial was set for the week of February 9, 1976. (CR 6, J.A. 39)

The Government does not allege that his fingerprints were found on any of the items charged in the indictment, or on any other items that would indicate a "recent" presence in the motor home.

Fingerprint analysis identified others as having been in the motor home as well. More to the point, authorities had conducted "throw downs" along the major route in the Oregon desert. No one identified Dennis Banks; however, others not charged were identified as travelling in the motor home on November 14, 1975. See CR R-160, RT 6/17/80 pps. 115-116, CR R-242, CR R-216, RT 3/9/83 pps. 30, 48-49.

[4] The FBI was fully aware that the evidence was going to be destroyed, but did nothing to stop the destruction. (See RT 3/22/76 pps. 9, 50, 51; RT 5/9/78 pps. 72, 88, 91, 125, 131, 153, 166-169, 172, 211-212; RT 6/17/80 pps. 30, 67.) Judge Belloni found that the evidence was "on a conveyer belt to be destroyed. And one word by a member of the FBI would have stopped that conveyer belt." (RT 5/19/78 p. 122)

A superceding indictment was returned on December 22, 1975. (J.A. 39) Two days later respondents filed a motion to suppress evidence. They alleged a violation of their due process rights from the Government's unilateral decision to deny them access to the very same items they were charged with possessing.[5] Respondents also asserted prejudice from the burning of plastic and cardboard containers in which the destroyed evidence was found. No fingerprint analysis had been conducted on these items. (CR 17, J.A. 39)

On January 21, 1976 the trial date was continued for one month on motion of respondents Redner and Loud Hawk to March 8, 1976. (CR 36, J.A. 41) The paramount reason for the continuance was problems with defense investigation.[6]

On January 26, 1976, respondent Dennis Banks was arrested in California. All parties felt that one joint trial with Mr. Banks would be desirable, even if the March 8 trial date was unrealistic. (RT 2/5/76, pps. 42-48) On February 18, 1976, the trial date was reset to May 12, 1976. (CR 62, J.A. 46)

Judge Belloni granted the respondents' suppression motion on March 31, 1976, and suppressed "all evidence, tangible and intangible, relating to" alleged dynamite. (Pet. App. 157a, J.A. 48) On April 19, 1976 the Government filed a notice of appeal from that order, and moved the District Court for a continuance of the trial date. (CR 115, J.A. 49) The request for delay was summarily denied. (CR 120, J.A. 50) The Government then made a similar plea to the Ninth Circuit Court of Appeals on April 23, 1976. (J.A. 1) Respondents immediately filed an opposition to that request, demanding observance of their right to a speedy trial, and outlining the prejudice that would be suffered if a continuance were granted. (FCR 1086, J.A. 1, 162-168) The Government's request for stay was denied by the appellate court on April 26, 1976.

[5] Testimony from the FBI's chemist and from explosives expert McCreary cast substantial doubt on the indictment's assertion that the substance destroyed was capable of explosion. (RT 3/22/76 pps. 61, 64; RT 5/9-10/78 p. 223; CR R-26; Pet. App. 37a-40a; J.A. 174)

[6] The United States Attorney's Office had instructed all "its" witnesses to refrain from talking with anyone associated with the defense. Judge Belloni ultimately ORDERED government counsel to "notify those [eastern Oregon and western Idaho state and local] officers whom he asked not to talk to defense counsel that his prohibition no longer applies." (RT 3/22/76, pps. 78, 83-90; CR 92, J.A. 48)

On April 26, 1976, the Government informed the district court that it"[could not] proceed without the [suppressed evidence]," despite the fact that the suppressed evidence had nothing to do with the gun counts. (RT 4/26/76, p. 5) Respondents again insisted on proceeding to trial on May 12th. (RT 4/26/76, p. 12, CR 127)

On May 4, 1976, the Government again asked the District Court for a continuance, at which time the Government conceded that respondents "desire the case to be tried at the earliest practicable opportunity." (CR 136, J.A. 51)

On May 11, 1975, the Government admitted that it was willing to suffer a dismissal with prejudice for refusing to proceed to trial. (CR 140) (J.A. 51)

On May 12, 1976, the case was called for trial. All respondents were ready:

> MR. ROBERTS:
>
> Our defendants' rights under the Speedy Trial Act as well as the Constitution of the United States are being flagrantly violated by the dilatory tactics of the Government in this case.
>
> We are ready for trial. We demand our trial; we demand our day in court now. We want our total and full exoneration by a jury. This is the day set by the Court many months ago for trial. We are ready and need our trial today.

The Government refused to proceed. Judge Belloni dismissed the case with prejudice, saying:

> I am ready to try the case commencing today. Both parties have had ample time to prepare. The defendants are ready to go to trial. For some reason, which I do not understand, the Government is not, even though two of the counts are not even concerned with the subject of previously suppressed evidence. I do not want to dismiss this case without a trial. The factual and legal dispute should be heard and decided, but there is no way the Court can force the Government to call its witnesses. My only recourse is to dismiss the case against these four defendants.
>
> Clearly, there has been unnecessary delay in bringing these four defendants to trial. Clearly, it's the fault of the Government.

(RT 5/12/76 pps. 4-5) (J.A. 169)

Before respondents, their families, their supporters, and the press, the Government verbally contested the District Court's jurisdiction to dismiss the case, and filed its notice of appeal in open court. (CR 142, J.A. 52, 53; RT 5/12/76 pps. 9-12; Pet. App. 122a-123a, fn.2; J.A. 169-170)

During that hearing the Government asked the Court to impose release restrictions on respondents during its appeal of the dismissal. It also requested the Court continue the vitality of its subpoenas. (RT 5/12/76 pps. 6-8, 9-10; CR 149A; J.A. 53)[7]

The consolidated and expedited appeals were argued and submitted on October 15, 1976. (Pet. App. 123a) A divided panel affirmed on July 26, 1977. (Pet. App. 88a-118a)

The Government's petition for rehearing *en banc* was granted on October 17, 1977. (J.A. 3) (Pet. App. at 123a) On March 6, 1978, the Court of Appeals (without giving up jurisdiction of the case) remanded to the District Court for an

[7] During the course of the May 12th hearing, the Government also frankly admitted that it did not need the suppressed evidence to go forward on the unrelated counts. See RT 5/12/76 pps. 6, 8-9, 10, 13-16.

evidentiary hearing.[8] Judge Belloni held that hearing on May 9 and 10, 1978.[9] The government's motion for an extension of time until July 14, 1978, for filing its proposed findings of fact was granted. (Pet. App. 123a) The District Court issued its Findings of Fact on August 23, 1978. (J.A. 171-174)

The *en banc* Court issued its opinion on August 7, 1979 (*id.* at 36a-87a), reversing the suppression order and reinstating the dynamite counts.[10] The Court found that the Government's refusal to proceed to trial on the non-dynamite counts was totally unjustified and constituted unnecessary delay. (Pet. App. 60a) Although dismissal of those counts was entirely proper, the Court reversed the "with prejudice" aspect. Even though the Government knew it was going to suffer a dismissal, the Court held that forewarning of the dismissal sanction must come from the Court to the Government, rather than the other way around. (Pet. App. 61a)

Respondents' petition for rehearing with suggestion for rehearing *en banc*, filed August 17, 1979, was denied October 1, 1979 (J.A. 6); their Petition for Certiorari was likewise denied March 3, 1980. The Mandate was received in the District Court on March 20, 1980. (CR R-30)

On May 12, 1980, Judge Redden ruled that if the Government wished to proceed with the dismissed counts, a new indictment would be necessary. (RT 5/12/80 p. 7) Although the Govern-

[8] Judge Ely dissented from the remand order, referring to it as a "wasteful, futile, and unnecessary burden." Judge Choy also dissented from the order. (J.A. 4)

[9] Respondents' presence was ORDERED at the remand hearing, unless they filed waivers of appearance. (CR R-3, CR R-5, CR R-7, CR R-11, CR R-15)

[10] Judge Ely, in dissent, recorded his "belief that the proceedings in this appeal, with two hearings before the full court, and all the deliberations that followed, reflect a futile exercise." (Pet. App. 86a-87a)

ment had indicated that it was fully satisfied with the December, 1975 indictment, and had requested its reinstatement, it brought forth a new indictment with increased charges. (Pet. App. 140a; RT 4/14/80 pps. 5-7, 21-22) Motions to dismiss for vindictive prosecution were filed. Respondents' motions charged that the Government was retaliating for their assertion of certain rights. Prominent among those asserted rights was the demand for a speedy trial. (CR R-97, J.A. 63)

Judge Redden found that the circumstances surrounding the bringing of the 1980 indictment created an appearance of vindictiveness, but that the Government had dispelled that appearance except as to KaMook Banks, and accordingly ordered the indictment dismissed with prejudice for her on August 12, 1980. (CR R-120, CR R-122, J.A. 66)[11]

Both sides appealed Judge Redden's Order. Notices were filed in August and early September, 1980.[12] The appeals, classified "expedited" pursuant to Ninth Circuit Rule 20, were consolidated. (J.A. 14) Respondents Dennis Banks, Redner and Loud Hawk filed their opening brief on October 15, 1980, and the Government filed its brief on November 3, 1980. The case was argued and submitted on January 7, 1981.

On July 29, 1982, the Court of Appeals reversed the dismissal of the indictment as to KaMook Banks. It also dismissed the appeal of the other respondents under authority of *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 102 S. Ct.

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[11] Arguments on other motions were also heard in the District Court after remand. Some of those motions had been left unresolved on May 12, 1976, when the Government refused to proceed to trial and appealed Judge Belloni's resulting dismissal order. All parties treated those motions as having been "pending in the District Court from December, 1975." See: Government Brief before 9th Circuit at page 39. (J.A. 34)

[12] Respondents Dennis Banks, Redner and Loud Hawk took their appeal on the authority and reasoning of *United States* v. *Burt*, 619 F.2d 831 (9th Cir., 1980) and *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir., 1980).

3081, 73 L.Ed.2d 754 (1982). Respondents' petitions for rehearing and for certiorari were denied on October 5, 1982, and January 10, 1983, respectively (459 U.S. 1117).[13] The Mandate of the Court of Appeals issued on January 31, 1983. (Pet. App. 5a)

Trial was set to begin on April 11, 1983, but was reset to May 3, 1983, at the request of the Government, and over the

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[13] Respondent KaMook Banks filed her Petition for Certiorari asserting that the facts of her case were clearly distinguishable from those of *United States* v. *Goodwin*, 102 S.Ct. 2485 (1982). (This Court concluded in *Goodwin* that a prosecutor should not be manacled to an initial charging decision, and that retaliation for an assertion of non-routine rights was more likely after appeal because a successful appeal required the Government to do over what it thought it had already done correctly. However, the vindictive-appearing indictment in this case was the fourth charging instrument, issued five years into this prosecution. Furthermore, it was brought after an appeal and a successful defense assertion that required the Government to seek a new indictment after it protested that it was completely content with the superceded one.)

The remaining respondents filed their petitition because KaMook Banks had filed hers. They feared that a forced severance of the cases would allow her to create the law of this case before this Court, where they could not participate. The result would have been not only a deprivation of their appellate rights, but also a needless waste of judicial, governmental and defense resources. (As in 1976, these indigent defendants did not want their resources [as well as those of their families, supporters, and volunteer lawyers] further taxed by the need to defend two separate trials.) (See J.A. 162-164) Their claim was based on the holding of *Cohen* v. *Beneficial Industrial Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and the line of this Court's cases criticizing piecemeal disposition of cases on appeal (J.A. 19)

While their Petitions for Certiorari were pending before this Court, all respondents were busily preparing for trial. *They were ready to proceed to trial within a short time after the return of the mandate; the Government was not.* (CR R-197 J.A. 71; RT 3/9/83 pps. 2-18)

vociferous objection of respondents. (See RT 3/9/83 pps. 8-9) Two additional continuances were on the Court's own motion. Respondents objected to each continuance. (Pet. App. 125a)

On May 20, 1983, the District Court again dismissed the indictment, finding that respondents' rights to a Speedy Trial under the Sixth Amendment and to Due Process under the Fifth Amendment were violated by the delay. The Government filed its notice of appeal on June 17, 1983. Again, the appeal was "expedited." (CR R-271)

After requesting an extension of time, the Government filed its opening brief on August 16, 1983. (J.A. 33, 35) Respondents submitted their brief on September 1, 1983. Argument was heard on January 4, 1984, and the Court of Appeals affirmed on August 30, 1984. (Pet. App. 1a-25a)

The Court of Appeals applied the four-prong balancing test of *Barker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (length of delay, reason for delay, assertion of right and prejudice) to the unique facts of this case, and upheld the District Court, finding that respondents had been denied their right to a speedy trial.

The Government filed a Petition for Reconsideration, which was denied on January 8, 1985. With no Motion to Stay Mandate having been filed, the Mandate issued on January 16, 1985.[14] The Government filed its Petition for a Writ of Certiorari on February 26, 1985. The Writ was granted by this Court on April 15, 1985.

SUMMARY OF ARGUMENT

This criminal case has been pending in the federal courts, without interruption, since the fall of 1975. Respondents have

[14] Respondents' argument that this case is now moot is presented in their Brief in Opposition at pages eighteen (18) through twenty (20). The argument is predicated on the fact that petitioner willingly let the mandate of dismissal issue.

had no trial. They have demanded a speedy trial since early 1976.

The antique nature of this case is explained by two facts. First, the Government refused to proceed to trial in May, 1976. It did so despite respondents' demand for a speedy trial, and despite the orders of the District and Circuit Courts denying motions for a continuance. Its reason for violating these orders—a desire to appeal the suppression of evidence not material to two counts of the indictment—was totally unjustified. Every court that has reviewed the Government's refusal to go to trial in 1976 has found the delay resulting therefrom "wholly unnecessary." (Pet. App. 3a-4a, 29a-30a, 60a, 122a, 150a)

Second, the Ninth Circuit took an unconscionably long time to decide the two interlocutory appeals in this case. Over six years was consumed awaiting decision of two appeals.

The advanced age of this case, the inappropriate delay in the appellate process, the Government's improper refusal to proceed to trial, respondents' strong demands for a speedy trial, and the prejudice suffered from this extensive pretrial delay compelled both the District Court and the Court of Appeals to find a violation of the Speedy Trial Clause.

The Sixth Amendment enshrines the right to a trial without lengthy delay. Petitioner seeks to exempt all pretrial appellate delay from the balancing test of *Barker* v. *Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972). Alternatively, it seeks to skew the *Barker* test so that such delay will always be constitutionally inoffensive, regardless of its duration or its purported justification.

A. The Speedy Trial Clause guarantees a trial without undue delay to any citizen accused of crime by the Government. No part of the Government can be exempted from this requirement without eviscerating the Sixth Amendment. Appellate courts are part of the Government.

Petitioner's assertion that appellate courts are incapable of acting with sufficient dispatch to conform to the requirements of the Sixth Amendment is incorrect as a matter of fact, and frightening as a proposition of law. Constitutional requirements are not to be avoided simply because they may require some effort to achieve.

The balancing test of *Barker* v. *Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972) is well designed for considering pretrial appellate delay. If the Government or the defendant appeals when there is no right to do so, the resulting delay will be weighed accordingly in the balance. On the other hand, each side to a lawsuit must expect and tolerate reasonable delays from the proper assertion of rights by either party. It is when that appropriate and expected delay becomes too long to be justified by the reason for the delay that the right to a speedy trial may be violated. Delay is no less harmful to the defendant or to society simply because it arises from appellate processes.

B. Despite the technical dismissals in this case, "the government has not taken a single step * * * to indicate in any way that it is abandoning the prosecution." (Pet. Reply Memo. 4) Nevertheless, the Government wants this Court to exempt this prosecution from the clear language of the Sixth Amendment, which applies to "all criminal prosecutions." Petitioner's argument requires that it grossly contort the holding of *United States* v. *MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982).

The Sixth Amendment protects a defendant in an ongoing Government appeal pursued by the Government as part of its effort to try, convict, and incarcerate that defendant. In this circumstance no charges are dropped in good faith to allow further review and investigation. Rather, the executive is vehemently pursuing its case; it is formally, publicly and actively seeking trial of its accusations. During the technical dismissal, defendants-appellees are not only suffering the debilities of someone who is a known suspect, but also those of a formally accused citizen. Bail provisions apply (18 U.S.C.

§ 3143 [c]), and can be reconsidered at any time. The defendants remain subject to the supervisory powers of the District Court throughout the appeal. They may be required to litigate motions that presuppose a future trial (e.g., motions to continue subpoenas and for despositions of government witnesses). They will also be required to appear if a remand for an evidentiary hearing is ordered (as occurred in *Loud Hawk* in 1978).

Furthermore, they remain listed as "defendants" in an ongoing and public criminal proceeding. Lawyers must be appointed if the defendants are indigent (18 U.S.C. § 3006A). Additionally, the statute of limitations provides no protection from unlimited delay. As the vitality of the executive's public accusation and the disabilities imposed by law remain during an appeal of an involuntary dismissal, the Sixth Amendment applies.

C. Delay from a Government appeal of an involuntary dismissal cannot be exempted from the scrutiny of the Speedy Trial Clause. The Government would be rewarded for creating unnecessary delay and defendants punished for asserting their right to a speedy trial.

When this case was set for trial in May of 1976, the Government sought a continuance. If respondents had desired to take advantage of this golden opportunity for delay, they would have acquiesced in that request. The case would not have been dismissed, and respondents would have enjoyed the protection of the Sixth Amendment during the Government's appeal of the suppression order.

However, respondents vehemently opposed the Government's request for a continuance. They demanded a speedy trial. Both the District Court and the Ninth Circuit Court of Appeals agreed with respondents' strong opposition to the Government's request for delay. Nonetheless, the prosecution violated the courts' orders, and contumaciously refused to proceed to trial. The Government engineered the 1976 dismissal in this case. It should not be rewarded by excluding the

resultant unnecessary delay from the scrutiny of the Speedy Trial Clause.

D. Both the District Court and the Court of Appeals found that the *Barker* balance tipped sharply in respondents' favor. They were correct.

The length of delay before trial in this case is clearly inordinate. No court system requires the better part of a decade to decide two interlocutory appeals.

Much of the delay resulted from the Government's refusal to proceed to trial. That delay was clearly unnecessary, and must weigh heavily against petitioner.

During this delay respondents suffered prejudice to their case as material witnesses died and others no longer had any memory of the events. They also suffered the personal prejudice from the outrageous length of time they have lived with these unresolved accusations.

Respondents have always indicated their strong desire for a speedy trial. They stood ready for trial in May, 1976, objecting to the Government's continuance requests, demanding a speedy trial. They have objected whenever the Government has sought delay after each remand as well.

To remand this case for trial in 1985, finding no speedy trial violation, would be incompatible with the basic design of the Speedy Trial Clause. The Constitution requires that any citizen being prosecuted by the Government shall enjoy a trial without undue delay.

Delay when the prosecution violates court orders to proceed is undue. Delay from years upon years of appellate consideration is undue. Delay of nearly a decade before trial is undue.

ARGUMENT

A. THE GOVERNMENT'S SUGGESTED *PER SE* RULE EXEMPTING ALL PRE-TRIAL APPELLATE DELAY FROM SIXTH AMENDMENT SCRUTINY WOULD EVISCERATE THE RIGHT TO A SPEEDY TRIAL AND PROMOTE UNLIMITED AND UNJUSTIFIABLE JUDICIAL DELAY.

"The law's delay is among the whips and scorns of time." (Hamlet—Act III, S.1, L.73)

The case of *United States of America* v. *Kenneth Moses Loud Hawk, et al.*, has been pending in the federal courts, without interruption, since the fall of 1975. Respondents, charged with crimes by the Government, have had no trial. They have demanded a speedy trial since early 1976.

The bulk of delay (over six years) occurred while jurisdiction of the case was in the Ninth Circuit Court of Appeals. If jurisdiction had been in a trial court for that length of time without a trial, there is no doubt that the case would be dismissed for a violation of speedy trial rights. Petitioner seeks to excuse the delay simply because it occurred in an appellate court.

The right to a speedy trial exists "to spare an accused those penalties and disabilities—incompatible with the presumption of innocence—that may spring from delay in the criminal process." *Dickey* v. *Florida*, 398 U.S. 30, 41, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) (J. Brennan, concurring) Delays *can* hurt the accused and *will* harm the judicial system and the public at large. *Barker* v. *Wingo*, 407 U.S. 514, 519-520, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) Delay is no less destructive simply because it derives from appellate processes.

The Government presents two main arguments in its quest to render the Sixth Amendment blind to this particular type of governmental delay. It suggests:

1) That appellate courts are incapable of functioning with sufficient dispatch to meet Sixth Amendment scru-

tiny. Rather than encourage the elimination of unjustifiable delay that may abridge a constitutional right, it seeks a wholesale exemption from Sixth Amendment requirements. (Pet. Brief 26)

2) If this Court feels uncomfortable with a wholesale exemption, petitioner advocates the same result by another proposed rule, to wit: Unlimited delay from every pretrial Government appeal would be appropriate as a matter of law. (Pet. Brief 22-26) Unlimited delay from every pretrial defense appeal would be appropriate as a matter of law. (Pet. Brief 38)

By either formula, acceptance of the Government's argument would mean that a whole tier of the court system would be insulated from the duty imposed upon it by the Sixth Amendment.

1. Setting The Stage: *Barker* v. *Wingo*.

When the Government advocates "not counting" appellate delay, it refers to the operation of the balancing test set forth in *Barker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).[15]

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[15] *Barker* followed a small number of cases in which this Court examined speedy trial claims. Those examinations identified some of the various components and aspects of the right. However, these cases did not provide a mechanism for determining when the right had been violated.

This Court recognized the need for a standardized approach to the issue, and therefore adopted the balancing test announced in *Barker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

For development of the law see: *Beavers* v. *Haubert*, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed.2d 950 (1905); *Pollard* v. *United States*, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957); *United States* v. *Ewell*, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); *Klopfer* v. *North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967); *Smith* v. *Hooey*, 393 U.S 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); *Dickey* v. *Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) and *United States* v. *Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

Barker rejected "inflexible approaches" to speedy trial questions. *Moore* v. *Arizona*, 414 U.S. 25, 94 S.Ct. 188 (1973) affirmed the mandate that "courts must engage in a difficult and sensitive balancing process."

In balancing the factors, the length of delay is looked at first. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." 407 U.S. at 530

Thereafter, the other factors are thrown onto the scales. The "reason for delay" factor can acquire different weights in the balance, depending on the reason asserted. A defendant's demand for a speedy trial is "entitled to strong evidentiary weight." *Id.*, at 531. Prejudice to the person and to the defense is the last factor, although it need not be affirmatively demonstrated for the scales to tip in favor of the defendant. (See *Moore*, *supra*.)

Not every type of delay before trial can result in a potential violation of the Speedy Trial Clause. The Sixth Amendment does not protect a person during a period "before a defendant is indicted, arrested or otherwise officially accused." *MacDonald*, *supra*, 456 U.S. at 6; see also *Marion*, *supra*, 404 U.S. at 313. If charges are dropped and the case returned to investigative status, there is no Sixth Amendment issue. *MacDonald*, *supra*.

When a speedy trial claim is asserted, the trial court must first determine whether the Sixth Amendment applies at all. If it does not, none of the *Barker* factors need be examined, and the concerns of the Due Process Clause of the Fifth Amendment are then considered. If the Sixth Amendment does apply to the delay, then the trial court must determine the length of delay. If the delay is sufficiently long to be presumptively prejudicial, then a full analysis of all factors ensues.

The Government's proposed exemption of all pretrial appellate delay requires that even decades of unwarranted pretrial

procrastination could not impact the Sixth Amendment. With no "countable" delay, no analysis of the remaining *Barker* factors could be triggered.[16]

2. The Government As A Whole Is Responsible For Providing A Speedy Trial.

It is the Government that runs the courts, defines what behavior is illegal, and prosecutes those whom it believes have transgressed the laws. The operation of the criminal justice system is wholly a governmental enterprise. If the Government as a whole is not responsible for providing a speedy trial, a speedy trial will not be provided.[17] (See Justice Brennan's concurring opinion in *Dickey* v. *Florida*, 398 U.S. 30, 51, 52 fn.18, 90 S.Ct. 1564, 26 L.Ed.2d 26 [1970].)

Although the executive branch of government (the police and the prosecutors) is more directly capable of effecting delay based on the peculiarities of its intimate association with any particular case, the legislative and judicial branches are fully capable of creating court delay too. Inefficiency in the judiciary should not be the responsibility of a defendant. The respon-

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[16] The Government's position is that if an individual, having demanded a speedy trial, were incarcerated for twenty-five years while an appellate court "considered" an interlocutory appeal, and during that time he had lost his family, all his witnesses had died, and the Government's witnesses' memories had evaporated (rendering the right of cross-examination meaningless), he could not complain because the interlocutory appeal time did not "count." Using our NewMath, we would close our eyes to twenty-five years of delay before trial of an accused and call it no delay at all. There being no delay, *Barker's* analysis cannot be "triggered."

[17] If the system does not process criminal cases with any speed, civil cases are doomed to saunter through at an even slower pace. This delay has become so pronounced that the prospect of establishments such as "Joe's Rent-A-Court" does not seem too farfetched. See "Companies Offer Alternative to Courts," THE NEW YORK TIMES, May 12, 1985, p.14

sibility for delay occasioned by "reason[s] such as * * * overcrowded courts * * * must rest with the government rather than with the defendant." *Barker* v. *Wingo*, 407 U.S. 514, 531, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)[18]

Petitioner is claiming that the appellate courts should be excused from their obligation to provide a speedy trial because they are allegedly incapable of meeting that obligation. (Pet. Brief 26) It is a frightening proposition that the petitioner presents: when the Government cannot meets its fundamental constitutional obligations, those obligations should be excused as a matter of policy. Constitutional guarantees are not to be so callously regarded, nor so easily avoided. Moreover, respondents do not share petitioner's cynicism. They believe that the appellate system is capable of fulfilling its speedy trial obligation.

As the Court of Appeals for the District of Columbia Circuit said ten years ago:

> If trial courts must expedite their procedures under the Sixth Amendment no reason appears why appellate courts should not be subjected to similar constitutional constraints. The time has come to move seriously toward genuine assurance that appeals will be considered expeditiously.

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[18] For example, in *United States* v. *Fox*, 3 Mon. 512 (1880), Congress failed to appropriate necessary funds for the Marshal to serve process in the Montana territory. Mr. Fox sought and gained his release because he was ready for trial and "the United States being plaintiff in the cases, and charged with the duty of providing the necessary money therefore" violated his speedy trial rights. The court held that "it is not material to inquire for what reason * * * the appropriations of money to enable marshals to serve process failed in Congress. The fact is sufficient for the purpose of this case."

See also *United States* v. *Blanca Perez*, 310 F.Supp 550 (S.D.N.Y., 1970), *United States* v. *Perry*, 353 F.Supp. 1235 (D.C. Cir., 1973), and allcases cited at page 44-45, footnote 46 of Respondents' Brief in Opposition. The cases make it clear that the Government bears the burden of the system's delay even if that delay is beyond its control.

United States v. *Sarvis*, 523 F.2d 1177, 1184 (D.C. Cir., 1975)

Although it "make[s] little sense to require that the appellate process proceed with the speed required of trial courts * * *" (Pet. Brief 26), it is a *non sequitur* to further conclude that it would "make little sense to require the appellate process proceed with the speed required by the Sixth Amendment." (Cert. Pet. 18) It is illogical to advocate the exemption of appellate processes from the requirements of the Sixth Amendment simply because another arm of the judiciary is capable of acting with more dispatch.[19]

[19] "[D]elay has become a prominent characteristic of the American appellate process and a growing threat to the effective administration of justice." *Delay in Criminal Appeals: A Functional Analysis of One Court's Work*, 23 Stanford Law Review 676 (1971) "[T]he caseload crisis is more serious in the courts of appeals than in the district courts, or for that matter than in the Supreme Court." Richard A. Posner, *The Federal Courts: Crisis and Reform*, p. x (Harvard University Press, 1985) Undue appellate delay is a fact. Many solutions to the problem have been proposed. (Some reasons for delay may be endemic to the Ninth Circuit. See, e.g., *LawScope: Split 9th Circuit?* 71 ABA Journal 30 [1985]; "*Engine, Engine Number 9. . . .*", California Lawyer, February 1985 p. 39; S. Hrg. 98-860, 98th Congr., 2nd Sess. 1 et seq. [1984]) If the entire appellate process moves more expeditiously, less undue delay will occur on pretrial criminal cases.

Petitioner, in suggesting legislative or rulemaking remedies as alternatives to "constitutional decisionmaking" for appellate delay (Pet. Brief 13) fails to recognize that the problem of pretrial delay is of consititutional dimension. It may well be that the promulgation of some form of "Speedy Appeal Act" or other rule would make it impossible for future pretrial defendants to wait three and four years for appellate disposition. The potential of a legislative remedy does not make a consitutional violation any less real. Certainly the hypothetical prospect of a "Speedy Appeal Act" cannot repeal the Sixth Amendment any more than the passage of the Speedy Trial Act did.

3. Appellate Courts Will Continue To Create Undue Pretrial Delay Until They Realize That The Constitution Mandates That They Provide A Speedy Trial.

This Court must be curious how it is that a criminal case can be continuously before one court or another for ten years and not yet have been to trial. A healthy portion of the delay is explained by the fact that the appellate courts seem nearly oblivious to their obligation to provide a speedy trial.

The Sixth Amendment Speedy Trial Clause does not apply to most criminal appeals, which are proceedings after trial and conviction. In such cases the defendant has already had his or her trial and been sentenced. The presumption of innocence is no longer enjoyed.

The appellate courts treat pretrial cases to which the speedy trial right applies exactly as they treat postconviction cases to which it does not apply. Respondents have been unable to find any rules, guidelines or other evidence to indicate that the appellate courts differentiate a case to which they owe a speedy trial from the vast majority of others they do not. Even the Administrative Office of the United States Courts (whose reputation for gathering statistics on the extreme minutiae of judicial functioning is legend) does not keep *ANY* statistics on pretrial criminal appeals. Such cases are merely lumped together for statistical purposes with all postconviction criminal matters.[20] See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: 1984, "Analysis of the Workload of the Federal Courts During the Twelve Month Period Ended June 30, 1984."

When a pretrial criminal case is before an appellate court, dispute resolution should be that court's predominant task. Published opinions (in which law is created, altered or explained) are not for the benefit of the pretrial defendants, but for that of future litigants. For the present pretrial litigant, the

[20] As the mythical figure B.T. Quackenbush is reported to have said: "If they don't count it, it doesn't exist."

judgment of the court explained by an unpublished memorandum or order would suffice.[21] "[O]pinion writing is an appellate judge's most time-consuming task."[22] It is an important part of the appellate court's work. However, it is not more important than the conclusive fact that the Constitution guarantees a speedy trial to any person the Government accuses of committing a criminal act.

If the issue in a pretrial case is of sufficient interest to justify a written opinion, appellate courts should nevertheless consider the delay required to craft it. One hazards to guess that the system will, in fact, survive until another case, unaffected by the Sixth Amendment's requirement of a speedy trial, presents itself.

Alternatively, the appellate court could issue an order of sufficient clarity to direct any further proceeding, enter its mandate, and publish an opinion for the benefit of bench and bar at a later date. It may well be that the Ninth Circuit knew it was going to remand for trial, but forced respondents to wait an additional year or more for that trial so that it could polish its opinion. If true, such a practice is unconscionable and irreconcilable with the Government's duty to provide a speedy trial.

Secondly, petitioner suggests that the delay occasioned on the second appeal may have occurred while the appeals court was awaiting this Court's disposition of *United States* v. *Hollywood Motor Car Co.*, *supra*.[23,24] If true, consideration of a pretrial defendant's case was entirely suspended while awaiting a possible pronouncement from this Court. On one hand, it makes unquestionable sense that an appellate court would want to await this Court's latest guidance on the issue before it.

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[21] See, for example, Ninth Circuit Rule 21.

[22] Posner, *supra*, at 12.

[23] Another relevant case before this Court at that time was *United States* v. *Goodwin*, 102 S.Ct. 2485 (1982).

[24] It is also possible that this Court's opinions sped up what might otherwise have been a longer Ninth Circuit deliberation.

However, there will always be the "latest word" in any area of law.

That this Court's opinions are of fundamental importance is a fact. Yet an accused's right to speedy trial is also a fact of fundamental importance. If the appellate court is aware that a potentially relevant opinion from this Court may be coming down the pike, it should not be able to suspend all consideration of a pretrial appeal without informing the litigants of its plan. The parties would then have a real opportunity to either acquiesce in the delay, or object to it.

In sum, appellate courts must become aware of the possible deprivation of a speedy trial that may result from the application of their otherwise routine practices.

4. The Government's Right To A Pretrial Appeal Is Not Of Constitutional Dimension, And Is Not More Fundamental Than The Sixth Amendment.

Should this Court be hesitant to adopt a rule holding that any appellate delay, no matter how extensive and unreasonable, cannot implicate the Sixth Amendment as a matter of law, petitioner urges the same result by a slightly different path.

Most pretrial appeals are Government appeals from orders suppressing material evidence or dismissing an indictment. (See 18 U.S.C. § 3731.) Petitioner argues that all delay during pretrial government appeals cannot impact a defendant's right to a speedy trial. This inflexible standard would apply even if the appeal were improper and judicially determined to be responsible for the creation of unnecessary delay, as in this case. (Pet. App. 60a) This argument is flawed,[25] and was

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[25] The cases that petitioner suggests "toll" the Speedy Trial Clause during a government appeal do not do so.

In *United States* v. *Jackson*, 508 F.2d 1001 (7th Cir., 1975) the District Court found a speedy trial violation, but based that conclusion on "the length of delay between indictments and disposition on the merits *has been* and *will be* unreasonable." 508 F.2d at 1004

rejected by Ninth Circuit Court of Appeals in *Loud Hawk*. (See Pet. App. 10a.)

As the Circuit Court held, the main problem with this argument is that it elevates the Government's appeal rights to a position superior to that of a constitutional guarantee.[26,27] This

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[emphasis added] The Government appealed, asserting that the "question of prospective delay in order to obtain appellate review of an interlocutory order poses a novel issue. * * *"(*USA* v. *Jackson* #74-1488 Brief of the United States p. 10.)

The court of appeals considered the speedy trial claim as of the date of dismissal. (*Id.*, at 1005) This is no more nor less than what the *Loud Hawk* panel did. (Pet. App. 11a, fn. 4) *Jackson* does not stand for the proposition that any and all delay attendant to a Government appeal is proper. That Court was not presented with that issue. Rather, the case holds that delay cannot be prospectively factored into the speedy trial balance.

The post-*Barker* cases cited by the Government clearly support the proposition that time on appeal is to be counted. The Government's contention otherwise is without support. See, e.g., *United States* v. *Herman*, 576 F.2d 1139, 1145 (5th Cir., 1978) ("Most of the delay * * resulted from the government's * * appeal."; "The government therefore submits that the delay attributable to the government is comprised of the period of the interlocutory appeal, government continuances to consider the same, and normal trial scheduling." [*Herman* Brief of Appellee (#77-5455) p. 22]). See also cases cited at pps. 42-43 of Respondents' Brief in Opposition, including those at footnotes 44 and 45 of that document.

[26] The Government's right to appeal is certainly no stronger than its right to try individuals the grand jury charges with crime. Yet, if unconstitutional delay occurs, the charges are dismissed, and no trial is held. *Strunk* v. *United States*, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973).

[27] Petitioner seeks to completely eviscerate the Sixth Amendment when it engages in the arguments presented in its Brief at pages 19-23.

Its Speedy Trial Act argument is a prime example of "apple and orange" logic. The Constitution is concerned with real and chro-

Court stated in *United States* v. *Wilson*, 420 U.S. 322, 337, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975): "* * * Congress intended to remove all statutory barriers to Governmental appeals and to allow appeals *whenever the Constitution would permit.*" [emphasis added] The Constitution requires a speedy trial.

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nological time; the statute deals with "excludable" and artificially compartmentalized "time." It is sufficient to note that "[c]ompliance with the Speedy Trial Act does not work as a bar to a Sixth Amendment claim." *Herman*, *supra*, 576 F.2d at 1144, fn. 3.

Its second proposition is also flawed. (It argues that as the Government appeals from orders that result from granting of defense motions, all ensuing appellate delay, even if unconscionable, should be excluded from Sixth Amendment scrutiny. Such delay is to be considered the "fault" of the defendant.)

Each party to a lawsuit must expect and tolerate reasonable delay from the exercise of rights that necessarily results in delay. Delay occurs until the court (which owes the defendant a speedy trial) resolves the issue presented. If the delay is reasonable, it can be called "resultant." If it is not reasonable, it does not "result" from the proceedings attendant to the exercise from the right but from something else.

The ruie the Government seeks is that an assertion of a defense totally absolves the Government from its obligation to provide a speedy trial. Clearly, the exercise of a Fourth, Fifth or Sixth Amendment right (or even a statutory right) does not require a speedy trial waiver. Are speedy trials to be provided only to those who tamely roll over and let the Government convict them of crime? Must an accused citizen risk decades of unwarranted pretrial delay as the price of challenging the Government at every stage before surrendering his freedom? That draconian choice is at the heart of the exclusion the Government proposes, and it is anathema to the design of our adversary system. A defendant is entitled to the protection of all the guarantees of the Constitution.

As a corollary to the petitioner's second proposition, it is suggested that only if the defendant wins on the Government's appeal should he or she be entitled to the protection of the Sixth Amendment. (Pet. Brief 22) But it is only when the defendant loses on a pretrial appeal that a case will go to trial. To provide a constitutional protection only in the circumstance where it is not needed is a sham.

5. The Fact That A Defendant Exercises A Right To A Pretrial Appeal Does Not Absolve The Government Of Its Obligation To Provide A Speedy Trial.

In a very narrow set of circumstances, defendants have a right to appeal before trial.[28] *United States* v. *MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978); *Abney* v. *United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). (Double Jeopardy issues are probably the only non-bail matters a defendant can now appeal pretrial.) Petitioner asserts that the exercise of that limited right is entitled to absolutely no constitutional protection from unlimited delay.[29] (Pet. Brief 35-36).

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[28] Respondents Dennis Banks, Loud Hawk and Redner exercised this right (alleging a vindictive prosecution after the Government "upped the ante" by its 1980 indictment) under the then-existing case law of *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir., 1980) and *United States* v. *Burt*, 619 F.2d 831 (9th Cir., 1980). While their appeal was pending, the holdings of those cases were overruled by this Court in *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982).

[29] Petitioner cites a number of cases (Pet. Brief 35-36) for the proposition that, in *Loud Hawk*, the Ninth Circuit "clearly erred in failing to exclude from the **length of delay** the more than two years attributable to the interlocutory appeal taken by respondents (other than KaMook Banks) of the district court's denial of their motion to dismiss for vindictive prosecution." [Emphasis added **this refers to**] It misreads those cases.

For example, in *Hill* v. *Wainwright*, 617 F.2d 375 (5th Cir., 1980) the court considered Hill's claim of a speedy trial deprivation (617 F.2d at 377-378). It determined the **length of delay** as follows:

> "The period of delay starts when a person is accused of a crime and ends when the trial begins. [citing *Marion, supra.*] * * * This petitioner became an accused and his right to a speedy trial was therefore activated on June 26, 1968 when the arrest warrant was issued. Here the delay of nearly three years serves as a "triggering mechanism" to invoke further analysis. [citing *Barker, supra.*]

Under its analysis of the ***reason for delay*** *factor* (617 F.2d at

If a pretrial appeal right is provided to a defendant, it means that the Courts have determined that the issue presented is so fundamental that an opportunity should exist for it to be heard before trial. *Cohen, supra.* As with a motion made to the trial court, a defendant knows that a pretrial appeal will result in delay. However, the Courts owe an obligation to rule within an appropriate period of time. The exercise of a pretrial appeal does not require a waiver of speedy trial rights—it merely means that a valid reason for an appropriate period of delay exists. If unlimited delay were the price a defendant would have to pay for asserting a defense, a chilling effect on the exercise of fundamental rights would result.

Petitioner's *per se* rules would excuse *all* appellate delay, regardless of its justification or length. Appellate delay may result from an improper government appeal (as in *Loud Hawk);* or a proper appeal may consume an unconscionably long period of time (as in *Loud Hawk).* Neither a *de jure* exclusion of all pretrial appellate delay from Sixth Amendment scrutiny, nor a *de facto* exclusion justifying all such delay without regard to its relevant circumstance or duration, is compatible with the Sixth Amendment. Such inflexible rules

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378-379) the court considered how to weigh the delay. It found that the "delay between June 26, 1978 [sic] and February 7, 1969, approximately seven and one-half months, should not be charged against the government since Hill was at large during that period." It further held that "[t]he appellate delay occasioned by petitioner's various legal initiatives should not be attributed to the state."

In other words, the court found that the **length of delay** included all the time during which he stood accused. Under the **reasons for delay** factor ("different weights should be assigned to different reasons"—Barker, supra 407 U.S. at 531) it concluded that that delay could not be attributed to the prosecution.

All the other cases cited by the Government employ a similar analysis. The length of delay *always* includes the time during which an individual is accused.

would not permit the district courts to carry out the examination contemplated in *Barker, supra.*[30]

Appellate courts are not above the Constitution, rather, they are sworn to serve it. They must process pretrial criminal appeals as expeditiously as they can, while still providing due consideration of the narrow issues such appeals present. It is neither reconcilable with the guarantee of a speedy trial nor wise to permit appellate courts to take years, or even decades, to decide matters that should be concluded in a matter of months. Such unconscionable delay can deny a speedy trial just as surely as a similar quantum of delay emanating from any other source.

B. THE SIXTH AMENDMENT'S SPEEDY TRIAL CLAUSE PROTECTS A DEFENDANT-APPELLEE DURING A PRETRIAL APPEAL PURSUED BY THE GOVERNMENT AS PART OF ITS EFFORT TO TRY CONVICT AND INCARCERATE THAT DEFENDANT

The Sixth Amendment provides:

> In **all criminal prosecutions,** the accused shall enjoy the right to a speedy and public trial * * *. [emphasis added]

As petitioner has noted, even though the mandate of the Ninth Circuit upholding the District Court's dismissal in *Loud Hawk* has issued, **"the government has not taken a single step * * * to indicate in any way that it is abandoning the prosecution."** (Pet. Reply Memo. 4) [emphasis added]

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[30] See *Atkins* v. *People of the State of Michigan*, 644 F.2d 543 (6th Cir., 1981), *cert. denied*, 452 U.S. 964; *Chism* v. *Koehler*, 392 F. Supp. 659 (W.D. Mich., 1975), *aff'd*, 527 F.2d 612 (6th Cir., 1976), cert. denied, 425 U.S. 944, 96 S.Ct. 1868, 48 L.Ed.2d 188 (1976); *United States* v. *Bailey*, 399 F. Supp. 526 (M.D. Fl., 1975) and *United States* v. *Perry*, 353 F. Supp. 1235 (D.D.C., 1973), *aff'd memo.* (D.C. Cir., December 12, 1973).

That statement is the truth of the matter. The Government is doing everything in its power to try respondents on the charges it successfully asked the grand jury to proffer. However, petitioner argues that this criminal prosecution is not among the class of "all criminal prosecutions" to which the Sixth Amendment applies. In so doing, it not only ignores the clear language of the Sixth Amendment, but also contorts the main authority upon which it relies—*United States* v. *MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). (Pet. Brief 32-33)

This Court held in *MacDonald* that "the Sixth Amendment has no application after the Government, acting in good faith, formally drops charges." *MacDonald, supra*, 456 U.S. at 7. *MacDonald* involved a dropping of charges followed by a period of investigation, not a dismissal over the Government's vigorous objection followed by an appeal designed to overturn that dismissal.

The *Loud Hawk* court correctly concluded that the circumstances in *Loud Hawk* were the antithesis of those confronting Dr. MacDonald. (See Pet. App. 8a-9a)

1. Formal Accusation.

The executive branch of Government is responsible for enforcing the laws. It is the branch that arrests or otherwise accuses a person of criminal conduct. The Government removes the stigma of formal accusation when the executive branch formally drops charges, as it did against Dr. MacDonald. This act publicly announces that it is not presently prepared to prove any illegality.

When a Court dismisses charges over the Government's objection, the veracity of the executive's accusation is not directly addressed. Dismissals of this type occur for reasons that may be wholly extraneous to the Government's belief in the facts of the case. When the Government appeals an involuntary dismissal, that extraordinary act is a public statement

asserting the depth of its belief in its accusation of crime. The Government does not "drop" charges in this setting—it actively continues to pursue them.[31]

2. Actual Restraints.

"After the charges * * * have been dismissed 'a citizen suffers no restraints on his liberty * * *.'" *MacDonald, supra*, 456 U.S. at 9, quoting *Marion, supra*, 404 U.S. at 321.

Respondents suffered many restrictions on their liberty that, by their very definition, could not be suffered by "anyone openly subject to a criminal investigation," but not charged. These disabilities of an accused pretrial defendant not only reaffirm the vitality of the Government's formal accusation, they also exist as an independent basis for providing Sixth Amendment protection.

A. Respondents Were Subject To The Imposition Of Bail Or Incarceration While Their Case Was Technically Dismissed.

When the Government voluntarily dismissed the charges against MacDonald, it willingly dropped all restrictions on his freedom. When the Government suffered a dismissal in this case in 1976, it publically contested the power of the District Court to dismiss, and requested that it impose bail restrictions.

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[31] Petitioner's contention that its inability to try respondents during the dismissal voided respondent's Sixth Amendment rights is unpersuasive. (Pet. Brief 32) It admits that the Sixth Amendment applies when a defendant appeals before trial. (Pet. Brief 32, fn. 20) It is also clear that the Sixth Amendment would apply when the Government appeals a suppression order under 18 U.S.C. § 3731. In both cases the District Court will not try a case. Furthermore, the lack of an immediately triable indictment does not deprive a person of Sixth Amendment protection. *Dillingham* v. *United States*, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975).

When no prosecution is pending, as in *MacDonald*, no bail or other release restriction can be sought. However, during a post-dismissal Government appeal, release restrictions are provided for by statute. 18 U.S.C. § 3143 (c) reads:

> **(c) Release or detention pending appeal by the government.**—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 of this title, in accordance with the provisions of section 3142, unless the defendant is otherwise subject to a release or detention order.

When a case is "dropped," i.e. voluntarily dismissed, the former defendant is totally free. During their involuntary dismissal, respondents were defined by statue to be identical to any other pretrial defendant. "[When] the Government has taken an appeal from a dismissal of an indictment * * * section 3143 provides that *the defendant is to be treated as any other defendant still awaiting trial.*"[32] U.S. Department of Justice, "Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress" p. 10 (December, 1984); See also S. Rep. 98-225 98th Cong. 1st Sess., 27 (1983).

Furthermore, when the Government obtains a FRCrP 48(a) dismissal, "the prosecution shall thereupon terminate," and thus no release restriction can be imposed. (See Judge Redden's analysis of FRCrP 48(a) at Pet. App. 127a-128a.) In contrast, 18 U.S.C. § 3731 and § 3143 not only authorize bail for

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[32] The Government's ability to seek release restrictions while it appeals a dismissal order is a derivative right. It derives from the fact that a formal accusatory instrument was brought forth and that the Government is actively opposing its dismissal. Until and unless the dismissal is finally affirmed, or the Government abandons its appeal, the prosecution retains the ability to seek bail. This is a fundamental difference between the status of one merely under investigation and not a defendant. *Cf. MacDonald, supra.*

an appellee of an involuntary dismissal, but also refer to the appellee as "person charged with offense" and a "defendant."

In construing Illinois' scheme for setting bail during a government appeal of an involuntary dismissal, the Seventh Circuit noted:

> * * * [T]he language of Ill. Rev. Stat. ch. 110A, § 604, requir[es] the posting of a bond pending appeal if there exists [sic] "compelling reasons" to detain. **The court certainly would not allow bail to be set unless the charges were considered to be still pending until final adjudication.**

United States ex rel. Fitzgerald v. *Jordan*, 747 F.2d 1120, 1124-1125 (7th Cir., 1984) [emphasis added]

B. Respondents were ORDERED to appear for an evidentiary hearing while their case was technically dismissed.

The charges against Dr. MacDonald were "dropped." He had no court appearances to attend until (and unless) the Government decided to bring charges. Respondents were ORDERED to appear at the hearing required by the Ninth Circuit's remand order. Even though they executed waivers of appearance, they nonetheless had to abide by the requirements of F.R.Cr.P. 43.

Other factors further distinguish respondents' position from that of a person merely under investigation, and show the force of the continuing accusation of crime.

3. Respondents Were Listed As Defendants In A Criminal Proceeding While Their Case Was Technically Dismissed.

When Dr. MacDonald's case was dropped by the Government, he no longer was a "defendant" in any proceeding. Not so with respondents. As counsel argued before the District Court:

> "[Respondents] continuously * * * had their names listed as defendants in cases that were pending in front of either this court or the Court of Appeals. * * * [T]o say someone [who] was listed in an appellate proceeding or trial court proceeding is not standing accused of a crime in a case listed as United States v. Somebody as defendants, I think is totally specious. It is [fundamentally different from] a case [which is] dismissed and then at some point later on the Government decides to reindict." (RT 4/29/83 p. 49)

4. Respondents Not Only Needed Counsel, But Were Appointed Counsel While Their Case Was Technically Dismissed.

"**Prudence** obliged [Dr. MacDonald] to retain attorneys at his own expense" during the time his case was dropped by the Government. [emphasis added] *United States* v. *MacDonald*, 531 F.2d 196, 204 (9th Cir., 1976) reversed at *United States* v. *MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) **An ongoing criminal appellate proceeding with respondents named as defendants** obliged respondents to have counsel. While their case was technically "dismissed," attorneys were appointed on their behalf under the Criminal Justice Act, 18 U.S.C. § 3006A. The provisions of that Act apply "[i]n every criminal case in which the defendant is charged with a [crime]." § 3006A(b) The appointment continues "at every stage of the proceedings * * * through appeal. § 3006A(c)

5. Respondents Had To Litigate Motions Regarding The Vitality of Government Subpoenas And Requests For Depositions Of Witnesses While Their Case Was Technically Dismissed.

Unlike the termination of a prosecution that Dr. MacDonald experienced, respondents had to litigate Government post-dismissal motions. Furthermore, these motions were based on the premise that the appellate court might overturn the District Court's dismissal. In 1976 (and again in 1983) the Government moved the District Court to continue the vitality of its subpoenas (the same motion was also made to the Court of Appeals in 1983). (CR 149a, J.A. 53, CR R-274, CR R-278, CR R-281, CR R-289, J.A. 33, 34, 78-79) (In 1983 the prosecution

moved the Court for post-dismissal permission to depose all its witnesses. [CR R-262, J.A. 77])

6. Respondents Were Subject To The Supervisory Power Of The District Court While Their Case Was Technically Dismissed.

Dr. MacDonald's life was not connected to any court while his case was dropped. Respondents have always been subject to the supervisory power of the District Court. In addition to the power relating to release restrictions, respondents have been subject to local rules relating to extrajudicial statements, as the Government admits. (FCR 1030, CR R-172)[33]

7. Respondents Were Not Protected By The Statute Of Limitations While Their Case Was Technically Dismissed.

When a citizen is the recipient of a voluntary dismissal, he or she can count on any applicable statute of limitations to put a time limit to the "public obloquy, stress and anxiety [suffered by one who is] openly subject to a criminal investigation." *MacDonald, supra*, 456 U.S. at 9. If the statutory period runs and the Government has not changed its mind and decided to renew the charges, the matter ends. Respondents have no such protection, both because the Government does not have to change its mind about prosecuting them, and because the statute of limitations does not apply to an ongoing case.[34]

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[33] Six days after the 1976 dismissal the Government wrote to Judge Belloni. The letter explained that "* * * simply because the Indictment has been dismissed does not totally divest the Court of all jurisdiction in the case. For example, although the matter is on appeal, this Court had the right, although it chose not to exercise it, to set conditions of release for the defendants (18 USC 3731), as well as to exercise certain other supervisory power over the parties during the pendency of the appeal; for example, enforcing Local Rule 7 relating to extrajudicial statements, etc." (FCR 1030, CR R-172)

[34] One of the reasons that this Court noted in finding that the North Carolina procedure of *nolle prosequi* violated a defendant's speedy

8. Respondents' Case Was Not "Dropped" For Further Investigation. It Was Actively Prosecuted.

That the circumstances of *Loud Hawk* and *MacDonald* contrast so sharply is partly explained by two basic observations:

1) Dr. MacDonald was not afforded Sixth Amendment protection because his prosecution was dropped so that the Government could further investigate the facts of his case.

2) Kenneth Loud Hawk et al. were afforded Sixth Amendment protection because their prosecution was continuing while a *legal* impediment was being reviewed.

One of the logical underpinnings of *MacDonald* is a policy consideration: The Government should not be forced to keep charges pending against an individual when it may not think it can prove them. Such a consideration plays no part where, as in *Loud Hawk*, the Government opposes dismissal, has completed its investigation, and maintains its publicly announced desire to try and to convict the defendants on the technically dismissed indictment. See *Casenote: MacDonald*, 114 St. Mary's Law Journal 113, 123 (1982).

If the Government succeeds in its legal contentions on appeal, it can proceed under the indictment.[35,36] By contrast, it

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trial right was that it tolled the statute of limitations. *Klopfer* v. *North Carolina*, 386 U.S. 213, 214, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967) "These statutes [of limitation] provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *Marion, supra*, 404 U.S. at 322. See also *United States* v. *Ewell*, 383 U.S. 116, 122, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); *United States* v. *Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

[35] When Judge Belloni dismissed the indictment he stated: "Inasmuch as I have power to do so, this dismissal of the indictment is with prejudice, unless the Ninth Circuit decides otherwise and remands the case or some part of it for trial." (RT 5/12/76. p. 8)

[36] Petitioner spawns a red herring when it alleges a need to appeal

must begin anew after a voluntary dismissal.[37,38]

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respondents' "legally erroneous" motions. Its effort to blame them for all the delay is neither factually nor logically accurate. (Pet. Brief 16)

The only reason that the case was dismissed in 1976 was that the petitioner refused to proceed to trial. Respondents wanted their trial, but had no option but to move to dismiss. That motion has been upheld as "legally correct" by every court that has reviewed it. It was only the "with prejudice" aspect of the dismissal that was overturned—and that for an alleged deficiency on the part of the trial judge, not of respondents.

[37] In *United States* v. *Bishton*, 463 F.2d 887 (D.C. Cir., 1972), a defendant's motion to dismiss was allowed, and a Government appeal ensued. Nine months later, the District Court dismissal was affirmed. Three months thereafter, the Government reindicted. The Court referred to the *three month interval* between affirmance of dismissal and reindictment as "* * * the period between the end of one prosecution and the beginning of another * * * [during which] he 'suffers no restraints on his liberty and is not the subject of public accusation.' " 463 F.2d at 891. The Court therefore held that the first prosecution was not at an end until the Court of Appeals affirmed the District Court's dismissal. *Bishton* is *specifically* referred to by the *MacDonald* Court. 456 U.S. at 8, fn.7.

[38] Petitioner, in its footnote 22, reads the same *MacDonald* footnote in which this Court cited *Bishton* as "indicat[ing] its intent that the holding apply to all dismissals. * * *" It bases this argument on the assumption that "18 U.S.C. § 3161(d)," cited therein, refers to both its subsections. (Section 3161 [d] contains two subsections. Subsection [d][1] addresses the timing of a trial upon recharging. Subsection [d][2] addresses the timing of a trial following reinstatement of a dismissed indictment on appeal.) A close examination of the Government's brief on the merits in *MacDonald* shows language closely resembling the *MacDonald* footnote. It is clear that only subsection (d)(1) was material to the Government's argument. (See *MacDonald* Pet. Brief 16-17, 31 [especially footnote 24].)

Thus, even though *MacDonald*'s footnote 7 can be read as including both subsections of § 3161 (d), it can also be read as limited to subsection (1). Furthermore, it should be noted that the operation of § 3161(h)(6) cited in that footnote is consistent with the holding of the

9. The Trial Court Considered Respondents' Strong Desire For A Speedy Trial When Deciding Release Restrictions During The Technical Dismissal. To Focus On The Severity Of Restrictions Rather Than Their Nature Punishes Respondents For Wanting A Speedy Trial.

Considerations of the differences between *MacDonald* and *Loud Hawk* aside, the inverse correlation the Government seeks to create between the severity of release restriction and the protection afforded by the Sixth Amendment cannot withstand scrutiny. (Pet. Brief 34)

First, *Klopfer*, *supra*, unquestionably rejects such a correlation. 386 U.S. at 220. As *MacDonald*, *supra* (456 U.S. at 8-9) and *Moore*, *supra* make clear, it is the nature of the disabilities any accused suffers, rather than the severity of these disabilities, that engages the Sixth Amendment.

Respondents readily admit that their release conditions could have been more severe (they could have been required to post bail—or in fact, could have been incarcerated). To strip them of their Sixth Amendment rights because of this fact would go against one of the most basic concerns of the speedy trial right: a defendants' desire for a speedy trial. See *Barker*, *supra*, 407 U.S. at 531-532, 534-536.

When this case was dismissed in 1976, respondents stood ready for trial, *demanding* their speedy trial. It was *petitioner* that refused to proceed. The District Court knew that respondents wanted to go to trial. He knew that they would want to and have to keep in contact with counsel while the case was on appeal. He released them in a manner consistent with their desire for a speedy trial, and his knowledge that they would reappear if need be.

It must also be remembered that the relationship between the parties has been characterized by the Government as "acri-

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Court of Appeals in *Loud Hawk*. See Judge Redden's opinion at Pet. App. 127a.

monious." (CR R-74) (J.A.60) (See also: Pet. App. 35a) Respondents have always been aware of the havoc that even a minor transgression of the law would cause in their lives. They would be ORDERED to appear in the United States District Court for the District of Oregon to argue against a Government request for bail on these "dismissed" charges. This is an advocacy of astonishing public policy for the Government to insist that the Sixth Amendment only affords protection to those pretrial appellees who break the law, do not want a speedy trial, or otherwise give cause for the imposition of tougher release restrictions during appeal.[39]

In sum, respondents have remained formally accused and subject to disabilities on their liberty commensurate with their status of pretrial defendants despite the technical dismissal of the indictment against them.[40] Petitioner admitted as much when it sought bail restrictions while it appealed the dismissal that it engineered. That it now takes a contrary position merely reflects its compulsive purpose.

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[39] The Government's argument, were it to prevail, would create a most anomalous situation. District judges might impose bail restrictions on people they would fully intend to release so that the individual would be protected under the Sixth Amendment in case the Government's appeal of the dismissal order took an inordinate amount of time.

[40] When the charges were reinstated in 1979 (and again in 1983 for KaMook Banks), it was as if they were never dismissed. The appeal served to stay the effect of the District Court dismissal order. Because that order was overturned, it never went into effect.

As all parties agreed, motions that had been filed and not ruled upon in 1976 were considered "pending" from that time. (See footnote 11, *supra*) The practical effect of a ruling overturning a dismissal and reinstating an indictment is as though the dismissal never occurred. (Pet. App. 128a) The indictment is not renewed, it is reinstated. The Sixth Amendment must therefore apply.

C. WHEN A SUPPRESSION ORDER IS ENTERED AGAINST THE GOVERNMENT WITH RESPECT TO ONLY ONE PART OF A CRIMINAL CASE, THE GOVERNMENT CANNOT CONTUMACIOUSLY REFUSE TO PROCEED TO TRIAL ON THE UNAFFECTED COUNTS AFTER BEING DENIED A STAY BY BOTH THE TRIAL AND APPELLATE BENCHES, AND SUFFER NO CONSEQUENCE UNDER *BARKER* V. *WINGO* FOR SUCH RECALCITRANCE.

To fully appreciate the injustice that would result if the time during which this indictment was technically dismissed were removed from Sixth Amendment scrutiny, one has to put oneself in the common position of the trial court and respondents in May of 1976.

In late March of 1976, Judge Belloni had suppressed all evidence material to alleged "dynamite." (CR 91, J.A. 48) Despite the May 12th trial date, the Government did not notice an appeal of that suppression order until the third week of April. It then requested a continuance of the trial date.

Because the suppressed evidence was not a "substantial proof of a fact material" (18 U.S.C. §3731) to the remaining firearms charges, Judge Belloni denied the continuance request. Of course, if respondents did not want a speedy trial (as petitioner wants this Court to believe), they would have acquiesced in the Government's request for an open-ended postponement. Rather, as Judge Belloni was well aware, their defense was aided by a large *ad hoc* volunteer effort. He fully understood the difficulties that these indigent respondents feared from a set-over.

Rather than give respondents the speedy trial the Government admitted they desired (CR 134, J.A. 51), or accede to the wishes of the District Court to proceed with the trial, petitioner asked the Ninth Circuit to order a stay. (J.A. 1) Respondents, rather than taking this second opportunity to postpone trial indefinitely, filed a vigorous objection to the Government's request, relying strongly on their right to a speedy trial. (J.A. 162)

A little more than two weeks before the trial date, the prosecution informed the Court and respondents that it probably would not proceed to trial on May 12th, even if ordered to do so:

> THE COURT: * * * [L]et's pin this down; if the trial date of May 12th still stands because the Court of Appeals has refused to change it, then on that morning when the case is called for trial, there will be no jury needed because there will be a motion by the Government to dismiss?
>
> MR. TURNER: No, Your Honor, I don't think so, because if we moved to dismiss—and I haven't really clarified this in my own mind, but I believe our present position is that if we move to dismiss, that would moot the appeal before the Ninth Circuit. I think that probably there would have to be a motion by the Court on its own or by counsel for the defendants to dismiss for want of prosecution.
>
> THE COURT: Yes. All right.
>
> MR. TURNER: And that is to the indictment, for the Government's failure to proceed as ordered by the Court. That would keep alive our appellate rights before the Ninth Circuit. My present feeling is that we would be ill advised to move on our own to dismiss the indictment on May 12th.

(RT 4/26/76 pps. 6-7, J.A.53)

The Ninth Circuit denied the stay request. (J.A. 1) Despite respondents' demand for trial and the District Court's Order for that trial, petitioner moved for continuances until the eve of May 12th. (CR 136, CR 139, J.A. 51)

When respondents appeared ready for their trial, and the Government refused to proceed, they had no option but to move to dismiss. The Court had no choice but to grant that dismissal motion. (See Pet. App. 150a) Had respondents' opposition to a continuance been less forceful, the Government's request might have been granted. The indictment would not have been dismissed. In that circumstance the Speedy Trial Clause unquestionably would have applied during the Government's

appeal. Respondents should not be denied the protection of the Sixth Amendment because they insisted on their speedy trial so strongly.

D. THE APPELLATE COURT CORRECTLY UPHELD THE THE DISTRICT COURT'S USE OF DISCRETION IN APPLYING THE ANALYSIS OF *BARKER* V. *WINGO* TO THE UNIQUE FACTS OF THiS DECADE-OLD CASE AND THEREIN FINDING A CLEAR SPEEDY TRIAL VIOLATION.

The Court of Appeals correctly upheld the District Court's finding that respondents' rights to a speedy trial had been violated. In fact, it held that the *Barker* balance tipped "sharply" in respondents' favor. (Pet. App. 18a)

LENGTH OF DELAY

As exhaustively discussed above, the Court of Appeals was correct in calculating "the delay in this case as ninety months, the period from the arrest of defendants until their indictment was last dismissed on May 20, 1983." (Pet. App. 11a) Clearly this delay was sufficient to "trigger" further inquiry.

REASONS FOR THE DELAY

Barker, supra, defines how to weigh the reasons for any particular delay in the balance of factors:

> * * * [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

407 U.S. at 531 The Court of Appeals weighed the reasons for delay as follows:

For the first pretrial appeal it separated the dynamite and non-dynamite counts. It concluded that the delay attendant on appeal of the latter was "wholly unnecessary" and weighed "heavily" against the Government.

As to the dynamite counts, the Court properly found that "[t]he Government's action in taking the appeal was therefore clearly justified, and would of itself support a reasonable delay. The problem is that this appeal took forty-six months." Although a shorter period of time might have been found justifiable for a pretrial, "expedited" appeal, clearly a nearly four year delay was neither "appropriate" nor justified. Such delay falls into the "neutral" *Barker* pigeonhole, and thus weighs against the Government, but less heavily. (Pet. App. 13a)

The delay attendant to the second appeal was considered justified by the Court of Appeals. It further found that six months of delay were the fault of respondents, and thus balanced the reason for the delay against a period of twenty-three instead of against twenty-nine months. It considered a twenty-three month period for a pretrial interlocutory appeal to be not "undue," and therefore did not weigh this factor in the balance. (Pet. App. 15a)

ASSERTION OF THE RIGHT TO A SPEEDY TRIAL.

More than by anything else, the antique nature of this lawsuit is revealed by the Government's assertion that respondents did not want a speedy trial. This case is so old that its revisionist history is already being written.

To "support" this claim, the Government faults defendants for requesting two short trial court continuances in early 1976. (Pet. Brief 42) These continuances were sought either to allow all defendants to be tried together, or to allow time for defense investigative efforts, stymied by the Government's instruction to witnesses to refrain from talking with the defense. Respondents made a total of two continuance requests, the last being in February, 1976, setting trial for May 12, 1976—the date on

which the **Government** refused to proceed to trial.[41] (CR 62, J.A. 46)

Petitioner suggests that respondents' demand for trial on May 12, 1976, was "purely gratuitous and pro forma"[42] because "the government had already clearly stated that it would not proceed to trial on that date because of the pending appeal * * * and respondents therefore knew that they would not be going to trial at that time." (Pet. Brief 4) Of course, no mention is made of respondents' fervent opposition to the Government's request for continuances. (See J.A. 162) Nor does petitioner mention that that continuing and vehement opposition began well before the Government announced that it would violate court orders and not proceed to trial.[43]

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[41] The 1980 continuances referred to at Pet. Brief 42 were not continuances of the trial date, but of motion or hearing dates well in advance of the scheduled trial. The Government also sought such extensions. (CR R-91, J.A. 63; RT 5/12/80 p. 14)

[42] Once out of custody (and laboring under their designation by the Government as "high risk" defendants pursuant to the District of Oregon's Plan for Prompt Disposition of Criminal Cases, Section 12[b]) respondents were busy organizing their defense in anticipation of trial. (See attachments to CR 138, J.A. 51.) Less than three weeks before the trial date, they petitioned the Court to hold the trial "in a facility sufficiently large to accommodate a reasonable number of members of the general public," since this case had attracted national attention and Indian people were coming to attend from all over the country. (CR 132, J.A. 50) The defendants firmly believed that the Government's case against them was riddled with misconduct and racism, and the Government knew that defendants were eager to put those charges before a jury. (See statements of Russ Redner at Brief in Opposition, page 52 [citing RT 12/19/75 pps. 44-45, RT 1/23/76 pps. 51-52].)

[43] For example:

> MR. YOUNGMAN: * * * I would like to take this time, Your Honor, to advise the Court that Mr. [Tommy] Hawk will no longer represent the Government on the case. Mr. Hawk feels that since the Government is going to appeal the Court's sup-

No court has ever charged defendants with seeking delay; every court that has ever had the opportunity to rule on the Government's irresponsible refusal to proceed to trial (despite denial of a request for stay by both trial and appellate benches) has laid responsibility for unnecessary delay at the U.S. Attorney's doorstep.[44]

When the Government requested delay, respondents opposed it. When the appellate bench was considering the request for a stay, a vigorous objection was filed. (J.A. 162) (See

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pression motion, that the trial might be put over until the late fall, in which case Mr. Hawk has other plans.

THE COURT: Who will be representing the Government?

MR. YOUNGMAN: Your Honor, I will and Mr. Turner.

THE COURT: All right. Good morning, Mr. Roberts.

MR. ROBERTS: Good morning, Your Honor. If I might address myself just briefly to the last statement, I'd like the record to reflect both my client's, my own, and co-defendants' strenuous opposition to any continuance of this trial. We're ready to go to trial, we want to go to trial on May 12th, we're prepared for trial, and we want to go.

THE COURT: There has been no motion for continuance, and I also intend to try the case on May 12th.

MR. ROBERTS: Thank you, Your Honor.

(RT 4/13/76 pps. 2-3 (*Cf. Manley* v. *Ryan*, 604 F. Supp. 404, 406 [M.D. Penn., 1985]: "This Court would be more receptive to Petitioner's application were there some record that he had asserted this right contemporaneously with the Commonwealth's motion for extension of time to commence trial.")

[44] Petitioner suggests that respondents did not want a speedy trial because they did not "press" the Ninth Circuit to act more quickly. But as petitioner well knows, once a case has been expedited under court rules (as all the appeals in this case were), there is nothing either party can do to speed up the process. With the exception of procedures for one-day appellate disposition of frivolous appeals (which were clearly inapplicable to this case—see Pet. Brief 42, and discussion of *United States* v. *Burt*, 619 F.2d 831 [9th Cir., 1980] at RT 8/12/80 pps. 190-191), procedures like those of Ninth Circuit Rule 20 merely crack a whip under counsel and court reporters. They do not address the years that a case can languish "under submission."

also FCR 1048) Nine years after the fact, the Government asserts that respondents did not want a speedy trial, yet only eight days before the May 12, 1976, trial date, the Government admitted that "the defendants [and] their counsel. . . desire the case to be tried at the earliest practicable opportunity." (CR 136, [FCR 810], J.A. 51) On the date set for trial, Judge Belloni found that the defendants were ready. (RT 5/12/76) After every remand, defendants reasserted their claim. (Pet. App. 135a)

Clearly, there was no error by either District or Circuit Court giving respondents' demands for a speedy trial "strong evidentiary weight." *Ibid.*, quoting *Barker*, *supra*, 407 U.S. at 531.

PREJUDICE.

There are two types of prejudice relevant to a speedy trial question: " * * * prejudice to the person and prejudice to the defense." *Dufield* v. *Perrin*, 470 F.Supp. 687, 691 (D.N.H., 1979)

Regarding the former, respondents have had these unresolved charges hanging above their respective heads like a sword of Damocles for nearly a decade. The District and Circuit Courts both found that respondents have suffered personal prejudice from the outrageous length of delay. (Pet. App. 16a, 136a)

Although a showing of prejudice to the defense is not an essential element of a successful Sixth Amendment claim,[45] respondents have made such a showing. Judge Redden found that material defense witnesses had died, and other material witnesses had lost all recollection of the events of November,

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[45] See *Moore* v. *Arizona*, *supra*, 414 U.S. at 26; *MacDonald*, *supra*, 456 U.S. at 8.

1975.[46,47] The Government had ample opportunity in the District Court to contest respondents' showing of "obvious" prejudice to the defense. It chose not to do so.

This case is almost a decade old—twice the statute of limitations. Prejudice to the defense, which need not be affirmatively demonstrated (but was) can even be presumed when the delay is this extensive. See *United States* v. *Vispi*, 545 F.2d 328, 334 fn. 7 (2nd Cir., 1976). See also *People* v. *Johnson*, 162 Cal. Rptr. 431, 606 P.2d 738, 749 (1980) (In Bank) and *Hodges* v. *United States*, 408 F.2d 543, 550 (8th Cir., 1969). In fact, when a defendant's claim "* * * has *prima facie* merit, the Government must make a showing which 'convincingly outweighs' a defen-

[46] Two people had seen the vehicles described by the FBI teletype on November 14, 1975, and been shown "throw downs" days after respondents' arrest. Both had opportunities to see occupants of the vehicles. None of the respondents was identified, although two other people were, according to the reports of the officers. These witnesses no longer have any recollection. (Pet. App. 137a)

[47] A sampling of the other prejudice in the record that the Courts did not mention in their opinions includes: 1) Respondents have been prejudiced by a change in public attitudes. (CR R-214, J.A. 100); *United States* v. *New Buffalo*, 600 F.2d. 368, 379 (2nd Cir., 1979); 2) Tape recordings of calls by material witnesses have been destroyed. (CR R-242, J.A. 102) *Dickey, supra*, 398 U.S. at 32, *Murray* v. *Wainwright*, 450 F.2d 465, 472 (5th Cir. 1971); 3) KaMook Banks, who successfully completed probation on an unrelated charge, can no longer have the possibility of concurrent sentences if convicted. *Dufield, supra*, 470 F. Supp. at 691; *United States* v. *Graham*, 538 F.2d 261, 265 (9th Cir., 1976); *Prince* v. *State of Alabama*, 507 F.2d 693, 707 (5th Cir., 1975) See also *United States* v. *Salzmann*, 417 F. Supp. 1139, 1144, 1164, 1168, 1169 (E.D.N.Y., 1976), *aff'd*,548 F.2d 211 (2nd Cir., 1977); *Smith* v. *Hooey, supra*, 393 U.S. at 378; 4) KaMook Banks and Kenneth Loud Hawk would have been eligible for Youthful Offender treatment and no longer are. *United States* v. *Black*, 416 F. Supp. 59, 62 (M.D. Fl., 1976), *aff'd* 548 F.2d 395 (2nd Cir., 1976); *Salzmann, supra*, 417 F. Supp. at 1173.

dant's assertion of prejudice." *Parks* v. *United States*, 451 A.2d 591, 602 (1982)[48]

THE BALANCE

The Government misses the mark when it states that the lower courts "gave virtually dispositive force" to the length of delay. (Pet. Brief 36, fn. 23) The District and Circuit Courts did not ascribe inordinate weight to the length of delay; rather the length of delay in this case is inordinate.[49]

[48] Judge Redden also found a due process violation resulting from the delay, and dismissed the indictment on that alternative basis. (Pet. App. 135a-138a) The Court of Appeals did not specifically address that part of the dismissal order, as it found a speedy trial violation. However, petitioner suggests (Pet. Brief 43, fn. 26) that "it would be appropriate for this Court to rule that there was no due process violation."

Judge Redden was correct in finding a due process violation as well. Petitioner points to no findings of fact that it believes are clearly erroneous. A bald assertion of error, without any showing to combat all the presumptions in favor of a correct application of discretion by a trial court, is not persuasive. See, e.g., *United States* v. *Hart*, 546 F.2d 798, 801-802 (9th Cir., 1976) ("clearly erroneous" standard of review of any pure or mixed findings of fact); *United States* v. *Mills*, 641 F.2d 785, 787 (9th Cir., 1981), *cert. denied*, 454 U.S. 902, 102 S.Ct. 409 ("abuse of discretion" standard of review in speedy trial cases).

[49] The longer the delay, the heavier that factor weighs in the balance. *United States* v. *Macino*, 486 F.2d 750, 752 (7th Cir., 1973); *United States* v. *Holt*, 448 F.2d 1108, 1109 (D.C. Cir., 1971), *cert. denied* 404 U.S. 942.

If four and one-half years is "substantial" (*United States* v. *New Buffalo*, 600 F.2d 368 [2nd Cir., 1979]), five years is "extraordinary" (*Barker, supra*), and six years is a "judicial catastrophe" (*United States* v. *Blanca Perez*, 310 F. Supp. 550 [S.D.N.Y., 1970]) then a seven and one-half year delay must at least be "unconscionable," and accordingly weighed.

Respondents suffered concrete and substantial prejudice to their case and their lives from this unconscionable delay. They have consistently demanded a speedy trial, and have opposed all Government attempts to delay, starting with their insistence on a trial in 1976.

Furthermore, the delay resulting from the Government's refusal to abide by court orders to try this case, and its improper appeal, was wholly unnecessary. The delay from the Ninth Circuit's consideration of the other proper appeals was too long to be justified. Six years is not an appropriate delay for determination of one- and two-issue appeals.

Since each of the *Barker* factors weighed in support of respondents' speedy trial assertion, the Circuit Court was correct in sustaining Judge Redden's ORDER finding a Sixth Amendment deprivation. The *Barker* scales do tip "sharply" in respondents' favor.

In sum, there can be no abuse of discretion in dismissing an indictment under *Barker* where, *inter alia:*

1) Over seven-and-one-half years of delay is at issue;

2) Four years of delay weighs heavily against the Government because of its refusal to proceed to trial and its improper appeal;

3) Material witnesses have died or have lost all recollection of the events of November, 1975, and respondents have been personally prejudiced with disabilities imposed by the pendency of this prosecution; and

4) The record and close dealing with the parties convinced the District Court that it was the defendants and not the prosecution that has continually desired a speedy trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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No. 84-1361

Supreme Court, U.S.
FILED
OCT 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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---

1. Respondents contend (Br. 15-28) that the time consumed by pretrial appeals is not materially different from trial court delay and that it should therefore always be counted within the length of delay relevant under *Barker* v. *Wingo*, 407 U.S. 514 (1972). In our opening brief we argued, however, that the nature of the appellate process is such that delays that would require explanation if they occurred in the trial court would routinely be justifiable as part of an appeal, and that it would therefore be inefficient — and would lead to errors such as the one committed by the court of appeals in this case — routinely to treat pretrial appeals as presumptive violations of the Sixth Amendment and then to undertake a largely standardless balancing in each case, the necessary result of the approach advocated by respondents.

We also noted (Br. 23-24 n.13) that the Due Process Clause safeguards defendants from prejudice resulting from intentional governmental misconduct and that there may be exceptional circumstances of judicial neglect that would warrant a full inquiry into whether the Speedy Trial Clause has been violated — *i.e.*, where a defendant who appears to be exposed to serious prejudice by appellate delay has been unable, despite requests directed to the court of appeals, to obtain a ruling within a reasonable time frame. In the absence of such circumstances, delays created by pretrial appeals should be conclusively presumed to comport with the Speedy Trial Clause for the reasons discussed in our opening brief (at 19-32, 35-36). In our view, this approach most faithfully implements the protections of the Speedy Trial Clause in the context of appellate delay while at the same time providing for the fair, efficient, and uniform treatment of constitutional speedy trial claims. Respondents offer no convincing reason to reject our approach.

a. Respondents claim (Br. 18-23) that appellate delay must be taxed against the prosecution because appellate courts are part of the government; they respond to our arguments based on the unique nature of the appeal process by suggesting that appellate courts should significantly alter their processes in order to decide pretrial appeals with greater dispatch. While it is of course true that it is the government as a whole that bears the responsibility to afford a defendant a speedy trial, it does not follow that delay in the appellate courts, which have different responsibilities and different decisional processes from the trial courts, should be counted against the government in the same manner as is delay at the trial level (see U.S. Br. 26). Moreover, respondents completely ignore their own passivity in the face of delay. In fact, had they desired a speedier trial, they could for example have agreed to defer their suppression claims until after trial. If respondents were

convicted, the district court could then have granted their motions following the jury's verdict; this course would have preserved their right to obtain a ruling on admissibility of the evidence, while affording them the speedy trial that they now claim to have desired all along and at the same time protecting the government's right to appeal the suppression rulings. See *United States* v. *Scott*, 437 U.S. 82, 100 n.13 (1978); *United States* v. *Ceccolini*, 435 U.S. 268, 271 (1978); U.S. Br. 24 n.13. Such relief could have been sought not only in the district court but at any time during the appeal process by means of a request to remand for trial.[1] Indeed, even at the current stage of the case, respondents have pressed their speedy trial claim as a means of avoiding or delaying trial, although its resolution could have been deferred until after trial, when such claims are "best considered" (*United States* v. *MacDonald*, 435 U.S. 850, 858 (1978)), without prejudice to them.

Recognizing that the appellate process as it has evolved in the contemporary American legal system is ill-suited to resolving disputes of any complexity with the speed that they believe is constitutionally required, respondents argue that the process should be streamlined by entering judgment shortly after argument with an opinion to follow or, indeed, forgoing preparation of an opinion altogether.[2]

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[1] Respondents' suggestion (Br. 44 n.44) that they were powerless to seek a more expeditious resolution from the court of appeals is in error. Both informal means, such as expressing to the court a desire to obtain a speedy trial, and formal means, such as petitioning for a writ of mandamus to compel a decision, are available, yet respondents chose neither. Instead, they bided their time and then, having been unsuccessful on the appeals, argued that the delay had ripened into a constitutional violation.

[2] Presumably respondents would require equal or even greater modifications of the procedures of this Court, especially since delay at this stage comes on top of the time already consumed by review in the courts of appeals. Understandably, respondents refrain from suggesting, for

While there is of course "no requirement in law that a federal appellate court's decision be accompanied by a written opinion," *Furman* v. *United States*, 720 F.2d 263, 264 (2d Cir. 1983), there is surely no warrant in the Sixth Amendment for the substantial disincentives to writing opinions in pretrial appeals inherent in respondents' submission, which would alter the nature of the appellate process with regard to pretrial appeals and deprive the legal system of an important body of precedential jurisprudence. See *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984) (noting "the benefit [this Court] receives from permitting several courts of appeals to explore a difficult question before * * * grant[ing] certiorari"). Opinion writing (in cases of sufficient importance and novelty to merit the task) is an integral part of the deliberative process of appellate courts in this country: " '[c]onclusions easily reached without setting down the reasons sometimes undergo revision when the decider sets out to justify the decision.' " P. Carrington, D. Meador & M. Rosenberg, *Justice on Appeal* 31 (1976), *quoted in* R. Stern, *Appellate Practice in the United States* 484 (1981); see also *Standards Relating to Appellate Courts* 58-61 (1977). By the same token, hastily written or ill-considered opinions could lead both to bad results in individual cases and bad precedents for future decisions. Respondents' proposed constitutional analysis would unjustifiably inhibit the process of appellate review in an important class of cases.

Moreover, it makes little sense to require an appellate court to consider, on a subsequent appeal, whether its own delay violated the Speedy Trial Clause. That question will

---

example, that this Court is constitutionally required to decide pretrial criminal cases more expeditiously by dispensing with opinions or, perhaps, by collapsing the petition and merits stages into one. Yet this is the necessary implication of their argument.

normally have been answered conclusively by the prior appeal itself, for there would have been no reason for the court of appeals to render a decision (as did the court here) remanding for trial if the length of delay had in its view already surpassed that which is constitutionally permissible. The time for a defendant's complaint is while the appeal is under consideration, when the court of appeals is still able to expedite its processes if it considers that necessary in order to secure the speedy trial guarantee, not after the event when curative action is no longer possible.

b. Respondents argue next (Br. 23-25) that their right to a speedy trial outweighs the government's right to appeal. We agree, of course, that the speedy trial right is constitutional while the right to appeal is not. But this commonplace hardly requires that the latter be sacrificed to the former. To the contrary, we urge here only what the Court has consistently recognized — that the right to a speedy trial is not absolute, but rather should be accommodated with other interests of both defendants and society through a functional analysis of the circumstances giving rise to delay. See, *e.g.*, *Barker*, 407 U.S. at 519-522; *Harrison* v. *United States*, 392 U.S. 219, 221 n.4 (1968); *United States* v. *Ewell*, 383 U.S. 116, 120-121 (1966); *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905); U.S. Br. 18, 24-27, 29-31. Just as the Double Jeopardy Clause does not prevent retrial of a defendant who is successful on appeal, *United States* v. *Tateo*, 377 U.S. 463, 465 (1964), so the Speedy Trial Clause should not bar trial following an appeal.

c. Respondents urge (*e.g.*, Br. 17-18, 23-24 n.25, 26-27 n.29) that claims like theirs should be evaluated by counting appeal time within the relevant length of delay and then assessing its significance in each case by determining the reasons for the delay. They claim that this is the approach consistently followed by the lower courts. As we explained

in our opening brief (at 36-38), however, the reasons generically justifying appellate delay make respondents' approach a largely futile and wasteful inquiry that can lead tc erroneous results and inconsistent treatment of similarly situated defendants. Whether pretrial appeal time is excluded at the outset from the calculation of the length of delay (*e.g., United States* v. *Jackson*, 508 F.2d 1001, 1005 (7th Cir. 1975)) or is included and then found justifiable in light of the reasons for the delay (*e.g., United States* v. *Herman*, 576 F.2d 1139, 1145-1146 (5th Cir. 1978)), the result should be the same. See generally *Hill* v. *Wainwright*, 617 F.2d 375, 378-379 (5th Cir. 1980) (time on appeal counts within length of delay, but it "should not be attributed to the state"); see also *United States* v. *Roy*, 771 F.2d 54, 59 (2d Cir. 1985) (delay on government's pretrial appeal was " 'occasioned by the defendant' " and therefore excludable under the Interstate Agreement on Detainers Act).[3] The difference is that the latter approach turns a disturbingly large percentage of pretrial appeals into presumptive violations of the Sixth Amendment (see U.S. Br. 28) and entails application of an increasingly elaborate set of rules for evaluating the circumstances of each individual case. See *Graves* v. *United States*, 490 A.2d 1086, 1092-1098 (D.C.

[3] Respondents discount (Br. 24-25 n.27) the relevance of Congress's determination that appellate delay should be excluded under the Speedy Trial Act (see U.S. Br. 19-20) on the ground that the Act "artificially compartmentalize[s]" the period of delay. In fact, however, the *Barker* test for assessing constitutional speedy trial claims also divides the time into distinct periods and assigns different weights to them. See *Barker*, 407 U.S. at 531; see also, *e.g., Graves* v. *United States*, 490 A.2d 1086, 1097 n.12 (D.C. 1984) (separating delay into 13 parts). In any event, respondents' objection to the relevance of the Act cannot be limited to consideration of appeal time, but would apply in every case, thereby making Congress's judgments in the Act irrelevant to application of the Speedy Trial Clause, in contravention of Congress's understanding and that of the courts (see U.S. Br. 19).

1984), overruling in part *Day* v. *United States*, 390 A.2d 957 (D.C. 1978).[4]

The lower courts' approaches reflect to varying degrees an understanding, which respondents' argument fails adequately to appreciate, of the differences between appellate and trial court delay. This area of the law would best be rationalized, as we argued in our opening brief (at 19-36), by excluding appeal time from the length of delay in all but the most egregious cases. At the very least, the Court should make it clear that appellate delay must be treated significantly differently from trial delay in arriving at the balance required by *Barker* v. *Wingo, supra*. Certainly the time periods routinely considered by the courts of appeals presumptively to prejudice defendants' rights under the Speedy Trial Clause (see U.S. Br. 28) are far too short to be capable of reasonable application when the delay is due largely to a pretrial appeal.

2. Respondents argue next (Br. 28-38) that *United States* v. *MacDonald*, 456 U.S. 1 (1982), which holds that the Speedy Trial Clause does not apply to periods during which a defendant is neither formally charged nor under actual restraints, is inapplicable where, as here, the government appeals from the dismissal of the indictment. To support

[4] Despite their appearance of precision, such rules do little to resolve the basic problem -- the inconsistent, virtually standardless approaches courts take to appellate delay. It is essentially meaningless to say that certain appellate time is weighed "lightly" or "neutrally" or "significantly," when in the end the cases seem to be decided almost intuitively. Compare, *e.g., Graves*, 490 A.2d at 1091-1105, with *id.* at 1107-1115 (Ferren, J., dissenting); see also Pet. App. 15a, 17a (purporting to excuse part of the time on appeal and to weigh another part "for or against neither side," yet ultimately including both periods within the length of delay, which was considered "[t]he most weighty factor by far"). We submit that the approach set forth in our opening brief would more faithfully achieve fairness and consistency between defendants as well as serve the purposes underlying the Speedy Trial Clause.

this claim, respondents state that despite the dismissal of the charges against them and the fact that they had been released without bail, the government was still actively pursuing its case and they continued to be subject to the possibility that bail might be imposed. Their argument is contrary not only to *MacDonald* but also to the Court's other decisions construing the applicability of the Speedy Trial Clause.

The Court has consistently made it clear that when no indictment is outstanding, it is only the "*actual* restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States* v. *Marion*, 404 U.S. 307, 320 (1971) (emphasis added); see *MacDonald*, 456 U.S. at 6-9. The mere *potential* for imposition of restraints or reinstatement of the indictment in the future cannot, consistently with *MacDonald*, be viewed as sufficient to give rise to a speedy trial right. The fact relied on by respondents (Br. 32-33) that the government's desire to prosecute them was a matter of public record also is insufficient. See *MacDonald*, 456 U.S. at 9 & n.9; *Marion*, 404 U.S. at 309. Finally, whether respondents technically were listed as "defendants" or were defendants within the meaning of certain statutory provisions (Br. 31-33) cannot control their status for purposes of the Speedy Trial Clause.[5]

While the government has never abandoned its attempts finally to bring respondents to trial, the fact remains that respondents were not formally under indictment during the

[5] Nor does the fact that respondents were ordered to appear at the evidentiary hearing held on remand in the district court during the first appeal (Resp. Br. 32) -- an appearance that they waived -- constitute the sort of "actual restraints" required under the Court's precedents as a basis for application of the Speedy Trial Clause in the absence of a formal indictment. Anyone may be ordered to appear in court or, for example, subpoenaed to appear before a grand jury; but such orders do not, in themselves, hold a person to answer a criminal charge.

appeals and that they were not subjected to actual restraints on their liberty. Similarly, in *MacDonald* the investigation continued after the dismissal of charges (456 U.S. at 5, 10-11 n.12), a dismissal that was largely involuntary and therefore shared important characteristics with the district court's dismissals here (see U.S. Br. 33 n.22). This case is wholly unlike *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), where the prosecutor could have restored an indictment to the docket upon request. Here, it was not within the government's power to proceed against respondents at a time of its choosing. No charging document was in force. Surely the Sixth Amendment does not require a speedy trial for persons whom the government is unable to try at all.

3. Respondents' assertion (Br. 42-45) that they have consistently sought a speedy trial is transparently false. In our opening brief (at 43), we noted that the utterly insubstantial nature of respondents' petitions for a writ of certiorari following the court of appeals' disposition of the second appeal clearly demonstrates their manifest desire to avoid trial. Respondents' attempt (Br. 9 n.13) to justify those petitions is without merit, as indeed the court of appeals concluded. See Pet. App. 15a ("the chances of [respondents] obtaining review by certiorari were virtually nil"). KaMook Banks's position on the merits of the vindictive prosecution issue was plainly foreclosed by *United States* v. *Goodwin*, 457 U.S. 368 (1982). See Pet. App. 31a-35a. Moreover, after the court of appeals reversed the dismissal of the indictment, her pretrial vindictive prosecution claim was in the same interlocutory posture as those of the defendants in *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982), in which this Court held that the courts of appeals have no jurisdiction to consider pretrial appeals on such grounds. The petition filed by the other respondents was, if anything, more frivolous. *Hollywood Motor Car* plainly foreclosed review of the district court's denial of

their vindictive prosecution motions, and even if KaMook Banks's petition had been granted, she obviously could not have established law of the case binding on the other respondents without their participation.

Respondents' contention that they effectively asserted their right to a speedy trial also ignores the fact that they could have sought deferred resolution of their claims for suppression of evidence until after trial (see pages 2-3, *supra*); had they done so, almost four years of the delay could have been avoided.[6] We stand on our submission (U.S. Br. 40-43) that the entire record demonstrates respondents' clear desire and dedicated efforts to avoid trial and that any isolated requests for a speedy trial, made only very early and very late in the day or at times when important prosecution evidence had been suppressed, were entirely pro forma demands that cannot negate respondents' acquiesence and indeed active participation in the major part of the intervening delay. Even a brief examination of the docket sheets in this case (J.A. 38-145) shows a defense strategy bent on avoiding trial by interposing an excess of motions, many of them wholly insubstantial. To reward this effort with a dismissal under the Speedy Trial Clause poorly serves that constitutional guarantee or the administration of justice.

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[6] No doubt a little imagination is required to come up with the concept of a deferred ruling on the suppression motion as a means of avoiding trial delay while preserving the government's right of appeal. But we are confident that respondents' skilled counsel could have hit upon that idea had they dedicated even a fraction of the effort expended on preventing the trial to the goal of holding one expeditiously.

For the foregoing reasons and those presented in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

OCTOBER 1985

No. 84-1361

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICUS CURIAE, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Public Defender Service for the District of Columbia offers this brief as amicus curiae in support of Respondents.

The Public Defender Service is an independent agency of the District of Columbia providing legal representation at the trial and appellate levels to indigent persons charged with crimes in the District. Each year the Service represents thousands of persons charged with serious offenses. In Fiscal Year 1984, for example, the Service represented sixty-five percent of the homicide defendants in the Superior Court of the District of Columbia. Sixty-

eight percent of the agency's felony clients faced charges with offenses carrying potential life terms. The Service represented clients in fourteen percent of the criminal cases in the District of Columbia Court of Appeals.

The United States Attorney prosecutes all serious crimes in the District of Columbia on behalf of the United States. District of Columbia law authorizes pretrial and midtrial government appeals to the fullest extent allowed by the Constitution of dismissals and orders suppressing or excluding evidence. By statute and court rule, these appeals must be expedited. However, because the District of Columbia lacks a local speedy trial statute, and the federal Speedy Trial Act does not apply, the Speedy Trial Clause of the Sixth Amendment provides the exclusive source of criminal defendants' and society's right to a speedy trial. Lengthy delays before criminal trials are widely perceived as a serious problem.

The Court's decision in the present case will have a significant impact on amicus and the administration of criminal justice in the District. In its interpretations of the Speedy Trial Clause, the District of Columbia Court of Appeals includes the time consumed by pretrial government appeals as part of the overall pretrial delay. The Court weighs unavoidable appellate delay as a neutral factor against the government comparable to delay from trial court congestion. Unreasonable delay caused by a failure to expedite as required counts as significant delay against the government. Still, the Court of Appeals has never found a speedy trial violation based in any part on government appeal time, even though District case law indulges a presumption of constitutional violation when overall pretrial delay exceeds one year. Thus, judicious consideration of the time devoted to pretrial government appeals does not limit the government's right to appeal, takes full account of the deliberative nature of the appellate process, and rarely leads to dismissal of criminal charges. Reversal of the Ninth Circuit decision

in this case on the primary ground advanced by Petitioner would reverse the District's speedy trial case law and eliminate the motivation of judges, prosecutors, and defense counsel to expedite pretrial government appeals.[1]

Examination of the District of Columbia experience in administering the constitutional speedy trial guarantee sharply undercuts Petitioner's policy arguments for excluding time spent on government appeals. The Public Defender Service submits this Brief to show that the balanced approaches of the Ninth Circuit and District of Columbia Courts of Appeals flow naturally from this Court's endorsement of flexibility in enforcing the speedy trial guarantee and promote the Sixth Amendment values of prompt and fair resolution of criminal cases.

SUMMARY OF ARGUMENT

Petitioner urges the Court to repudiate the "sensitive balancing process," *Barker* v. *Wingo*, 407 U.S. 514, 533 (1972) (footnote omitted), utilized by the Ninth Circuit for resolving speedy trial claims when government appeals have caused pretrial delay and instead to adopt a rule of blanket exclusion of pretrial appeal time. Petitioner's proposed rule cannot be reconciled with the understanding of speedy trial principles which commended a functional analysis to this Court in *Barker*, and Petitioner's meager attempts to distinguish *Barker* fail. Neither the question of who sets the pretrial proceeding in motion nor who wins on appeal has any logical bearing on the appropriateness of holding the

---

[1] The District of Columbia Court of Appeals has not considered whether to include time devoted to pretrial defendant appeals in evaluating speedy trial claims. Petitioner argues that this delay also should be excluded from the speedy trial calculus. Reversal of the court below for including the time for Respondents' pretrial appeal would remove the motivation which currently exists in the District for expediting double jeopardy appeals and would impinge on defendants' right to take those appeals.

government accountable for delay in the appellate courts, so long as both sides have litigated without dilatory objectives.

The experience of the District of Columbia in administering the Sixth Amendment speedy trial guarantee conclusively demonstrates that Petitioner's pragmatic arguments lack any foundation in reality. The District of Columbia Court of Appeals includes the time of pretrial government appeals in calculating the overall delay and assigns weights against the government for the periods of delay according to the circumstances of each case. In a jurisdiction where the United States Attorney has primary responsibility for criminal law enforcement and actively exploits a broad right of pretrial appeal, this speedy trial rule has produced the desirable consequence of pressuring the parties and the appellate court into prompt resolution of pretrial appeals, without any disservice to the deliberative nature of the appellate process, and has never led to the harsh remedy of dismissal.

ARGUMENT

THE TIME ATTRIBUTABLE TO PRETRIAL APPELLATE REVIEW OF RULINGS ON DEFENSE MOTIONS SHOULD BE INCLUDED IN CALCULATING THE LENGTH OF DELAY IN SPEEDY TRIAL CLAIMS, WITH WEIGHT APPROPRIATELY ASSIGNED ACCORDING TO THE REASONS FOR THE DELAY

In *Barker v. Wingo*, 407 U.S. 514 (1972), the Court concluded that inquiry into a speedy trial claim requires a "functional analysis" in the particular context of a case. *Id.* at 522. When faced with a defendant's assertion that the right to a speedy trial has been abridged, a court must engage in the "sensitive balancing," *id.* at 533 (footnote omitted), of at least four factors—the length of pretrial delay, the reasons for the delay, the defendant's assertion of the right, and prejudice to the

accused, *id.* at 530. The Ninth Circuit applied this "functional approach" to Respondents' speedy trial claim in a case where government appeals and defendants' cross-appeal consumed some six years of pretrial delay. *See United States v. Loud Hawk*, 741 F.2d 1184, 1191 (1984) (Pet. App. at 12a). The court interpreted the Speedy Trial Clause, consistent with the teachings of *Barker v. Wingo*, to require inclusion in the pretrial delay calculus of the extraordinary time taken by the appeals. Specifically, the court parsed the time of these appeals into distinct periods and assigned particular weights against the responsible parties, after considering the reasons for the appeals, the interests served by pretrial resolution of the claims, the entitlements of the parties to litigate them pretrial, and the reasons for the appellate delay. *Id.* at 1191-1192 (Pet. App. at 12a-15a).

The Ninth Circuit's flexible balancing approach is nearly identical with the speedy trial analysis of the District of Columbia Court of Appeals, which also includes the time on pretrial government appeals in calculating the length of delay.[2] *Graves v. United States*, 490 A.2d 1086, 1095-96 (D.C. 1984) (en banc), *petition for reh'g pending*; *Ball v. United States*, 429 A.2d 1353, 1356-57 (D.C. 1981); *Day v. United States*, 390 A.2d 957, 964-69 (D.C. 1978), *overruled in part on other grounds*, *Graves v. United States*, 490 A.2d at 1095. These functional tests are a small, seemingly obvious extension of *Barker v. Wingo*. Yet, Petitioner urges the Court to replace them with an ironclad rule of automatic exclusion of all pretrial appeal time. Essentially, Petitioner wants to resurrect a rigid, formalistic style of

[2] The District of Columbia Code does not contain a speedy trial statute and the federal Speedy Trial Act does not apply. *United States v. Alston*, 412 A.2d 351, 356 n.10 (D.C. 1980) (en banc). Therefore, the Speedy Trial Clause of the Sixth Amendment provides the exclusive source of any enforceable right to a prompt trial in the local courts.

speedy trial analysis rejected by the Court in *Barker v. Wingo* as insufficiently sensitive to the urgency and difficulty of providing defendants and the public a swift but fair resolution of criminal charges.

Petitioner is flatly wrong in its claim that only its rule of blanket exclusion can protect the government's right to pretrial appeals, for the District of Columbia experience proves the opposite: Federal prosecutors in the District conduct an active practice of pretrial appellate litigation, and although the appeal time counts against the government in the speedy trial calculation, judicious application of the *Barker v. Wingo* principles forces all parties to expedite the appeals, and the government has never been confronted with the ultimate sanction of dismissal of the charges.

This Court has recognized previously that both defendants and society have compelling interests in the prompt resolution of criminal cases. The constitutional speedy trial guarantee gives defendants "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell*, 383 U.S. 116, 120 (1966), quoted in *United States v. Marion*, 404 U.S. 307, 320 (1971). *See also United States v. MacDonald*, 435 U.S. 850, 858 (1978) (*MacDonald I*); *Barker v. Wingo*, 407 U.S. at 532; *Dickey v. Florida*, 398 U.S. 30, 37-38 (1970); *id.* at 42 (Brennan, J., concurring); *Klopfer v. North Carolina*, 386 U.S. 213, 221-26 (1967). At the same time, the speedy trial right promotes the community's goal of effective law enforcement by providing the swift judgments upon which deterrence and rehabilitation depend. *Barker v. Wingo*, 407 U.S. at 519-21. These common, strong interests do not evaporate, but operate with full vigor, when the government pursues a pretrial appeal. Whether pretrial delay occurs

at the trial or appellate level, the attendant anxiety, the oppressiveness of pretrial incarceration, and the harm to the defense are indistinguishable. Similarly, even when the government correctly decides that resort to the appellate process is vital to protecting its interests, the community's goals of promptly convicting and punishing the guilty and freeing the innocent are impaired by appellate delay. Thus both parties presumptively share an interest in seeing that an interlocutory appeal is quickly decided. Permitting pretrial government appeals to linger benefits few, if any, defendants, and certainly not society at large. To protect the values of the Speedy Trial Clause, expedition of government appeals ought to be the rule and not the exception.

Government accountability for the delay attributable to its appeals follows logically from the Court's speedy trial analysis in *Barker v. Wingo*. There, the Court acknowledged that while the accused has a strong interest in a speedy trial,

> [a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, . . . society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.

407 U.S. at 527 (footnotes omitted). The government's right to appeal district court orders dismissing charges or suppressing or excluding evidence, *see* 18 U.S.C. § 3731, is premised on the identical interest in effective but fair law enforcement as underlies society's right to a speedy trial when the government does not resort to the appellate court. *See United States v. Barletta*, 644 F.2d 50, 54-56 (1st Cir. 1981); S. Rep. No. 1296, 91st Cong., 2d Sess. (1970); *cf. Arizona v. Manypenny*, 451 U.S. 232 (1981); *United States v. Wilson*, 420 U.S. 332 (1975). Arguably, even less reason exists to relieve the

government of its obligation to provide speedy trials when the prosecution chooses to assume the burden of persuading the appellate courts that presumptively valid district court orders are incorrect.

The government's constitutional duty to bear the weight for its appeals is obviously not an obligation to suffer inexorably dismissals which produce windfalls for defendants. In fairness, the weight should vary, depending on the circumstances of each case. "[D]ifferent weights should be assigned to different reasons." *Barker v. Wingo*, 407 U.S. at 531. For example, if the government fails to expedite its appeal, it fails to fulfill its obligation to "bring[] swift prosecutions," *id.* at 527; consequently any time greater than an expedited appeal should normally require properly counts more against the prosecution in the speedy trial calculus. If, however, the government shows proper sensitivity to the Sixth Amendment and expedites its appeal, then the delay is appropriately "attributed to the processes of the court," *United States v. Loud Hawk*, 741 F.2d at 1191 (Pet. App. at 13a), and is akin to delay due to overcrowded courts. Accordingly, it should be assigned "neutral" weight against the government, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker*, 407 U.S. at 531.

These principles are applied in the District of Columbia. By statute, 23 D.C. Code § 104 (1981), the prosecution is permitted pretrial and midtrial appeals from orders dismissing charges, or suppressing evidence, or otherwise denying the prosecution the use of evidence at trial; and the right is liberally construed. *District of Columbia v. McConnell*, 464 A.2d 126, 128-30 (D.C. 1983). "In order to minimize the delay from pretrial appeals . . . Congress mandated that '[a]ny appeal taken pursuant to [§ 23-104] either before or during trial shall be expedited.'" *Graves v. United States*, 490 A.2d 1086, 1095

(D.C. 1984) (en banc), *petition for reh'g pending*, quoting § 104(e). Local court rule prescribes the procedure for expediting pretrial government appeals, *see* D.C. App. R. 4(c), and the Court of Appeals' *Internal Operating Procedures* (1985) assign priority to opinion writing in government appeals, *id.* at 12.

In *Day v. United States*, 390 A.2d 957 (D.C. 1978), *overruled in part on other grounds, Graves v. United States*, 490 A.2d at 1095, the Court of Appeals "settle[d] the question whether the period of interlocutory appeal by the government 'counts'" for speedy trial purposes. 390 A.2d at 965.

> Absent a rigid speedy trial timetable . . . we have to examine whether the appeal period provides any inherent reason why it should not be counted as part of the balancing test along with the period of trial court jurisdiction. Under the principles of *Barker v. Wingo* . . . we find no such reason; we hold that the appeal period should be counted.

Id. (citation omitted). The court was persuaded that "it would be disingenuous to suggest that the entire time during which a case is under advisement is consumed in unraveling complex issues." *Id.*, quoting *United States v. Sarvis*, 523 F.2d 1177, 1183-84 (D.C. Cir. 1975). Because appellate delay is a product of calendar backlog, the court concluded that pretrial appeal time must be considered the government's responsibility. *Id.* The court perceived no distinction between appellate court congestion and trial court congestion: "If trial courts must expedite their procedures under the Sixth Amendment no reason appears why appellate courts should not be subjected to similar constitutional constraints. . ." *Id.*, quoting *Sarvis*, 523 F.2d at 1184.

Recently, the court fine-tuned its analysis of government appeal time under the Speedy Trial Clause. *See Graves*, 490 A.2d at 1095-96. It reaffirmed the holding

in *Day* that appellate time "counts" against the government for speedy trial purposes, but withdrew from *Day*'s suggestion that the entire time weighs "significantly" unless the prosecution moves to expedite.

> . . . [W]e adhere to the concept of an intermediate category between neutral delay and intentional delay, and we continue to follow *Day* in labeling "significant" delays caused by government indifference or neglect. However, we hold that *Day*'s rigid rule—that, in the absence of a motion to expedite, all pretrial government appeal time must be counted as a significant charge against the government—is not in conformity with the *ad hoc* approach to speedy trial claims mandated by *Barker v. Wingo* . . . . The government has been given explicit authority to appeal before trial orders suppressing evidence. . . . Since some delay in the trial necessarily attends invocation of the appellate process, we think it inappropriate to count all such time automatically as significant delay.

Id. at 1095 (citations omitted). Accordingly, the court refined the balance "to distinguish between delay that could not have been avoided by efforts to expedite and unreasonable delay resulting from the failure to expedite." *Id.* at 1096.

> Unavoidable delay should be considered neutral, and thus counted against the government to roughly the same degree as delay caused by court backlog. Unreasonable delay caused by failure to expedite the appeal should be considered significant.

Id.

Thus the District of Columbia Court of Appeals has deftly struck a balance that is sensitive to both the values underlying the Speedy Trial Clause and the government's right to pretrial appeals. It enforces the speedy trial right by including pretrial appeal time and holding the government accountable for it, but it accommodates the

government's appeal right by giving significant weight only to "*unreasonable* delay caused by failure to expedite."

Petitioner fears that this delicate approach, a variant of which the Ninth Circuit applied below,[3] will wreak havoc, and it offers up assorted pragmatic arguments to prove its point. But first, almost in passing, Petitioner proposes that as a logical matter the Speedy Trial Clause should be tolled during the pendency of government appeals because the proceedings "have been set in motion by the defense." *See* Brief for Petitioner at 21-22. The argument is plainly wrong. For one thing, the argument wholly ignores the public's right to a speedy trial. The government's rule of exclusion would do nothing to impel "society's representatives," *Barker*, 407 U.S. at 527, to protect the community's interest in "swift prosecutions," *id.* Moreover, the argument proves far too much, because the underlying premise is vacuous.[4] When the defense moves to suppress evidence unconstitutionally seized, it could just as well be argued that those proceedings are "set in motion" by the government's agents' conduct claimed to be illegal. If the district court rules for the defense and concludes that the government acted illegally, the prosecution has little standing to assert that the defense is responsible for setting the appeal in motion. At bottom, of course, so long as neither side is acting for purely dilatory purposes, both defendants and society have an overriding interest in fair trials. Our entire system depends on and encourages vigorous advocacy including skillful pretrial litigation by both sides. Thus the question of who initiated a proceeding which

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[3] The Ninth Circuit's formulation is more advantageous to the government: All appellate time counts neutrally, including "unreasonable delay caused by failure to expedite." *See United States v. Loud Hawk*, 741 F.2d at 1191-92 (Pet. App. at 12a-15a).

[4] The logic of petitioner's hypothesis leads to the conclusion that all pretrial delay should be excluded, because the proceedings are set in motion by the defendant's (illegal) acts.

ultimately motivates a pretrial government appeal is utterly irrelevant to the question of whether a trial was swift as well as fair.

Petitioner reinforces a weak argument with the corollary notion that the government typically wins its interlocutory motions, because defendants *presumptively* file legally erroneous, frivolous, or dilatory pretrial motions. Predictably, Petitioner uses the fact that the government prevailed in its interlocutory appeals below to its best rhetorical advantage. But analytically, the question of who wins these appeals is irrelevant, because the interests underlying the speedy trial right are jeopardized by appellate delay, whoever prevails. Indeed, Petitioner implicitly acknowledges that "winning" has no logical bearing on its argument, for it does not offer an exception to its blanket rule for instances when the government is not vindicated; nor does it attempt to justify its rule for the cases in which it registers "losses." [5]

With support from single statistic purporting to demonstrate a seventy-five percent win rate on its appeals, *see* Brief for Petitioner at 29 n.17, Petitioner insinuates that because it usually wins its pretrial appeals, there is a strong public interest in prosecuting those appeals; consequently, all appellate time should be excluded automatically from the speedy trial calculus. In truth, the govern-

[5] Even when the government ultimately prevails on appeals, it will often be hard to conclude that diligent counsel erred by filing pretrial motions, let alone prove the government's premise that defendants file presumptively "legally erroneous motions," Brief for Petitioner at 22. Petitioner ultimately acknowledges that the legal issues in the two appeals here were far from clear-cut: "[T]he length of time consumed by the court of appeals in deciding the first two appeals, while considerable, may not have been wholly unreasonable in view of the complexity of the issues . . . and the delay that may have been occasioned while awaiting this Court's decision in *United States v. Hollywood Motor Car Co.*, [458 U.S. 263 (1982)], which was dispositive of the second appeal." Brief for Petitioner at 23-24 n.13.

ment's blanket exclusion rule would ignore appellate delay in the many cases—perhaps the far larger universe of cases—in which the government ultimately dismisses its appeals or loses in the appellate court. Since 1983, the United States Attorney, who prosecutes all felonies and almost all misdemeanors in the District of Columbia, has taken forty-two pretrial appeals to the District of Columbia Court of Appeals.[6] In the vast majority of these cases (twenty-four), the United States voluntarily dismissed the appeals after further reflecting upon their merits. It is not uncommon for the United States to dismiss a pretrial appeal after a considerable length of time. *See, e.g., Graves v. United States*, 490 A.2d at 1094 (six months). Thus, few (nine) of those appeals have reached final judgment. Of these, the trial court judgments were affirmed in six cases. In only three of the thirty-three closed cases (*i.e.*, roughly 9%) did the United States obtain either a reversal or remand. In 1985 alone, the United States lost four of the five pretrial appeals reported as of late July by the Court of Appeals. *See United States v. Bailey*, —— A.2d —— (No. 84-240, decided July 25, 1985) (affirming); *United States v. Mosby*, —— A.2d —— (No. 84-1694, decided July 3, 1985) (affirming); *United States v. Gayden*, 492 A.2d 868 (1985) (affirming); *United States v. Sell*, 487 A.2d 225 (1985) (reversing); *United States v. Lewis*, 486 A.2d 729 (1985) (affirming). This experience proves convincingly that petitioner's ubiquitous contention that defendants "induce[] the trial court[s] to err," Brief for Petitioner at 22, is entirely incorrect.[7]

[6] At the request of amicus, the Clerk of the Court of Appeals provided a computer print-out of all government appeals lodged since January 1, 1983. This print-out was reviewed for accuracy by the Appellate Division of the U.S. Attorney's Office for the District of Columbia, and cross-checked with the records of amicus and the files of the trial court.

[7] It is also not unusual for the prosecution to re-consider and substantially narrow the issues it presents on appeal. *See, e.g.,*

Petitioner intimates that a rule that includes appellate time in the speedy trial analysis deters the government from filing meritorious appeals. *See* Brief for Petitioner at 24-25. Revealingly, the government does not cite a single instance where it forewent an interlocutory appeal because of speedy trial concerns. If experience is any guide, the United States pursues an active program of pretrial appeals in the District of Columbia: Fully eight percent of the appellate caseload of amicus in the most recent fiscal year were government appeals; projections for the current fiscal year suggest that the number of government appeals will double last year's figure. Plainly, the District's speedy trial rule, which includes government appeal time, has not deterred filing of interlocutory appeals. Of course, so long as the government expedites its appeal, it has nothing to fear from the speedy trial implications of its actions (assuming good faith), because the District of Columbia Court of Appeals (like the Ninth Circuit) weighs neutrally the time devoted to expedited appeals. *See* page 10, *supra*.

Petitioner also argues that a rule of inclusion overlooks the "especially unhurried" pace of the appellate process. Brief for Petitioner at 25. Contrary to Petitioner's suggestion, *id.* at 26, it makes perfect "sense to require that the appellate process proceed with the speed required of trial courts by the Sixth Amendment." *Id.* For "it would be disingenuous to suggest that the entire time during which a case is under advisement is consumed in unravel-

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United States v. Mosby. In *Mosby*, the government's Notice of Appeal complained about the trial court's suppression of evidence on constitutional grounds. The issue ultimately presented was however, far narrower: whether the trial court erroneously decided that certain evidence is irrelevant. The Court of Appeals found no abuse of discretion and affirmed, observing as well that the trial judge's ruling was necessarily tentative and could be reconsidered as the trial progressed. —— A.2d at ——, slip op. at 5. Parenthetically, this probable advisory opinion took seven months to issue, though it was expedited.

ing complex issues." *Day v. United States*, 390 A.2d at 965. From a functional perspective, because trial court delay and appellate court delay disadvantage defendants and the community to the same degree, no distinction can be drawn between the courts. Since trial courts must expedite their processes to avoid speedy trial injury, appellate courts also must expedite interlocutory appeals to avoid the same harm.

Petitioner repeatedly voices fear that including the time attendant to appellate delay routinely will trigger burdensome speedy trial inquiries. *See* Brief for Petitioner at 28-30. Petitioner's point is partially correct. Particularly in jurisdictions where a constitutional violation is presumed by the passage of a certain period of time before trial,[8] speedy trial inquiries can be expected in those few cases delayed by a government appeal. But "a complete analysis and balancing of the *Barker* factors," Brief for Petitioner at 29, cannot truly be the cause of such consternation. Clearly, Petitioner has offered no evidence that speedy trial claims are clogging the trial or appellate courts, let alone those cases where the government appealed. Moreover, Petitioner fails to mention that speedy trial motions have the desirable effect of keeping enforcement of the speedy trial right in the public eye. Where the government can justify the delay, the motion to dismiss will be denied, in the absence of actual impairment to the defense, "which skews the fairness of the entire system," *Barker*, 407 U.S. at 532. In fact, if the government's appeal shows the complexity of the case, then the greater is the delay that will be tolerated. *Barker*, 407

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[8] The District of Columbia indulges a presumption of constitutional violation after the passage of one year: "In our previous cases we have said, variously, that a delay of more than a year gives prima facie merit to a claim that an accused has been denied the right to a speedy trial, creates a presumption of prejudice, and shifts the burden to the government to justify the delay." *Graves v. United States*, 490 A.2d at 1091.

U.S. at 531. Absent exceptional circumstances, then, post-appeal speedy trial scrutiny should only have the salutory effect of having prompted expediting the appeal in the first place.

Indeed, the experience of the District of Columbia shows conclusively that petitioner's fear is not realistic. In its three reported decisions involving speedy trial claims after government appeals, the Court of Appeals has found no violation of the speedy trial right. *See Graves v. United States*, 490 A.2d 1086; *Ball v. United States*, 429 A.2d 1353; *Day v. United States*, 390 A.2d 957. In the latter case, the court tolerated a 32½ month long delay between arrest and trial that included an 18½ month long government appeal, even though the appellate time was weighed as significant against the government.

It is telling that petitioner fails to cite a single instance other than this case where a court found a speedy trial violation on account of delay due to a government pretrial appeal. In fact, petitioner observes that appellate delay is not "a serious and systemic problem." Brief for Petitioner at 31. The import of this is clear: The government is justified in worrying about dismissal in only the truly extraordinary cases, such as this one. But this Court can be confident that affirmance of the Ninth Circuit would ensure that this situation will never recur.[9]

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[9] Petitioner also suggests that time devoted to pretrial defense appeals should be excluded from the speedy trial calculus. Brief for Petitioner at 35-36. The inordinate brevity of Petitioner's argument only highlights the fact that consideration of the time consumed by Respondents' cross-appeal was not essential to the Ninth Circuit's decision. *See United States v. Loud Hawk*, 741 F.2d at 1192 (Pet. App. at 15a). The bulk of the time consumed by Respondents' appeal (23 months) was wholly attributable as well to the government's second appeal. "The additional delay of six months that occurred as a result of [Respondents] seeking certiorari from the judgment of [the circuit] court dismissing the [cross-]appeal" was, moreover, "wholly excused." *Id.* That time was effectively subtracted from the overall pretrial delay and therefore did not "count" against the government.

Perhaps a rule of exclusion, such as the one applied by the Ninth Circuit with respect to the time consumed by Respondents' meritless certiorari petition, is an appropriate one for wholly frivolous pretrial appeals by defendants. Much as time consumed by defense-requested trial continuances is properly subtracted from the delay, the time devoted to such appeals might be excludable. But a blanket rule of exclusion, such as the one Petitioner urges, is overbroad. This Court has recognized a vital interest in pretrial double jeopardy appeals, *Abney v. United States*, 431 U.S. 651, 660-62 (1977), which would be burdened intolerably by a rule of exclusion. For as the Court acknowledged in *Barker*, defendants cannot be held responsible for court congestion. 407 U.S. at 531. The proper accommodation between the speedy trial and double jeopardy rights is, as the Court observed in *Abney*, "rules or policies giving [double jeopardy] appeals expedited treatment." 431 U.S. at 662 n.8. *See Gant v. United States*, 467 A.2d 968, 970 (D.C. 1983); *Coleman v. United States*, 414 A.2d 528, 530 (D.C. 1980).

CONCLUSION

For the foregoing reasons, the amicus curiae, the Public Defender Service for the District of Columbia, submits that the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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